90-625

No. 90-_____

In the Supreme Court of the United States

OCTOBER TERM, 1990

DANIEL HOY, DOUGLAS COUNTY, AND DOUGLAS COUNTY SHERIFF'S OFFICE,

Petitioners,

V.

ROBERT REED,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT E. FRANZ JR.
P.O. Box 10733
Eugene, Oregon 97440
Phone (503) 683-9512
Counsel for Petitioners

QUESTIONS PRESENTED FOR REVIEW

1. Was petitioner Douglas County entitled to an affirmance of the judgment entered in its favor on the grounds that its evidence of a significant amount of training entitled it to a directed verdict on plaintiff's claim of inadequate training, because such evidence, as a matter of law, precluded a finding of deliberate indifference or gross negligence.

2. Is *Graham v. Conner*, 109 S. Ct. 1865 (1989), to be applied retroactively to an excessive force case, when a plaintiff did not assert a claim for recovery based upon the Fourth Amendment in his pleadings or pretrial order, at trial, or on appeal, at a time when such a basis for recovery had been recognized by this Court and the Court of Appeals for the Ninth Circuit; and when the plaintiff expressly relied solely upon the due process clauses of the Fifth and Fourteenth Amendments as his basis for recovery.

3. Does a seizure occur within the meaning of the Fourth Amendment, when a police officer shoots a person, not to effect an arrest or take custody of the person; but rather in self defense, in order to stop the person from killing him.

4. Assuming that a Fourth Amendment seizure did occur in the case at bar, does *Graham v. Conner*, 109 S. Ct. 1865 (1989), preclude a substantive due process claim as a basis for recovery, or can a substantive due process claim be an alternative basis for recovery in pre-arrest excessive force cases.

5. Assuming the retroactive application of *Graham v. Conner*, 109 S. Ct. 1865 (1989), was proper in the case at bar, were petitioners nevertheless entitled to an affirmance of

the judgment for the reason that as a matter of law, the record before the court proved that Deputy Hoy acted in an objectively reasonable manner under the circumstances facing him at the time he shot Mr. Reed.

6. Can a United States Court of Appeals reverse a jury verdict and remand a case for trial on a legal theory not raised or asserted at trial or on appeal, when such legal theory had been recognized by this Court and the Court of Appeals prior to the time of the lodging of the pretrial order and trial.

7. Can a United States Court of Appeals reverse a jury verdict and remand a case for trial on an issue not asserted or assigned as an error by an appellant in his brief on appeal.

8. When a United States Court of Appeals reverses a jury verdict on a legal theory not raised or asserted at trial or on appeal, must the Court of Appeals also consider the defense of qualified immunity on the record before it, when that defense is rendered applicable by reason of the legal theory applied by the Court of Appeals in reversing the case; and if so, was Deputy Hoy entitled to an affirmance of the judgment on his defense of qualified immunity.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Statutory Provisions

PETITION FOR WRIT OF CERTIORARI

Petitioners, Daniel Hoy, Douglas County, and Douglas County Sheriff's Department, respectfully prays that the Court issue a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Ninth Circuit in the above-entitled case.

OPINIONS BELOW

The initial opinion of the United States Court of Appeals for the Ninth Circuit in this matter is reported as *Reed v. Hoy*, 891 F.2d 1421 (9th Cir. 1989), and is set forth as Appendix A. In its opinion and ensuing judgment, the Court of Appeals reversed and remanded the judgment of the Untied States District Court for the District of Oregon, which had entered a judgment for petitioners (then defendants) based upon a jury verdict entered in favor of the petitioners.

The order amending the initial opinion and denying petitioners' petition for rehearing is set forth as Appendix B. The amended opinion is reported as *Reed v. Hoy*, 909 F.2d 324 (9th Cir. 1990). The unreported jury verdict and judgment entered on that verdict are set forth as Appendices C and D, respectively.

JURISDICTION

Jurisdiction to review the Court of Appeals' judgment by writ of certiorari in this civil case is conferred upon this Court by 28 U.S.C. § 1254(1). The initial opinion of the United States Court of Appeals for the Ninth Circuit was filed on December 15, 1989, and the judgment sought to be reviewed was entered on the same date. The order of the United States Court of Appeals for the Ninth Circuit amending its opinion

and denying petitioners' petition for rehearing was filed on July 18, 1990.

This petition for a writ of certiorari is being filed within the 90-day period prescribed by 28 U.S.C. § 2101(c) and Rule 13 of the Court, as computed in accordance with Rule 30 of the Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved in this case are the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution. The federal statute authorizing civil actions for the deprivation of civil rights is 42 U.S.C. § 1983.

The Fourth Amendment to the United States Constitution provides in relevant part:

> "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, ..."

The Fifth Amendment to the United States Constitution provides in relevant part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> "[n]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

42 U.S.C. § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be

> subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

1. Basis of Jurisdiction in the Lower Courts.

The basis for federal jurisdiction in the United States District Court for the District of Oregon over plaintiff's claims is 28 U.S.C. §§ 1331 and 1343(3). The basis for jurisdiction in the Court of Appeals for the Ninth Circuit is 28 U.S.C. §1291.

2. Summary of Material Facts.

On the afternoon of Saturday, August 18, 1984, the plaintiff, Robert Reed, who at that time stood 5' 9 1/2" tall and weighed 205 pounds, got into an argument with his wife. During the argument, Mr. Reed hit his wife with his hands on her shoulders and in the head, and hit her with a hammer in the back as she laid on her stomach. He then told his wife he was going to kill her.

Mr. Reed's fifteen year old daughter saw the incident, and heard Mr. Reed threaten to kill her mother. Because the daughter believed that Mr. Reed was in fact going to kill her mother, she went to a neighbor for help, and at that time, telephoned the Douglas County Sheriff's Department, and requested the aid of a deputy.

Douglas County Deputy Daniel Hoy was dispatched to Mr. Reed's residence to check on the welfare of Mrs. Reed. When Deputy Hoy arrived at Mr. Reed's house, he got out of

his patrol car, and made contact with Mr. Reed, who at that time was outside of the house, crouched down near a crawl hole to the house, with his back to Deputy Hoy.

Deputy Hoy told Mr. Reed that he was investigating a possible crime, and asked to see Mrs. Reed. Mr. Reed ("I was very angry") replied that his wife did not want to speak to Hoy, and he told Hoy to get the "hell" off of his property. Hoy then stated that he was investigating a possible family disturbance and indicated that he would leave as soon as he spoke to Mrs. Reed.

After a short verbal exchange, Mr. Reed picked up a 36" bamboo stick that was used to stake flowers, held it in his hand, and using profanity, "hollered" at Deputy Hoy to get off of his property. In response to Mr. Reed picking up the bamboo stick, Deputy Hoy drew his nightstick. Mr. Reed then asked, "What are you going to do, hit me?" Deputy Hoy responded, "Only if I have to."

Deputy Hoy then once again requested to see Mrs. Reed, and assured Mr. Reed that he would leave after making sure Mrs. Reed was all right. Mr. Reed then walked up onto the porch to the house, got rid of the stick, and picked up a splitting maul out of a bucket of water. Deputy Hoy, who at this time was on the grass of the front lawn, then radioed for assistance on his portable radio.

Mr. Reed then, with the splitting maul in his right hand, walked down the porch steps, and onto the lawn. As Mr. Reed stepped onto the lawn, he was 15 to 20 feet from Deputy Hoy. Mr. Reed then "hollered" at Deputy Hoy, using profanity, "to leave my property, get away, get off my land."

Mr. Reed then walks toward Deputy Hoy, and Deputy Hoy started retreating, by walking backwards away from Mr. Reed. As Deputy Hoy continued to walk backwards, he told Mr. Reed to put the maul down. Mr. Reed responded by stating, "No, get off my property."

Mr. Reed continued to walk steadily towards Deputy Hoy, and Deputy Hoy continued to walk steadily backwards, but Mr. Reed was closing the distance between the two. After telling Mr. Reed on two more occasions to put the maul down, and after Mr. Reed refused to put the maul down, but instead continued to walk towards him, Deputy Hoy drew his service revolver, and pointed it at Mr. Reed.

Mr. Reed continued to walk towards Deputy Hoy, and because Deputy Hoy was walking backward with his eyes on Mr. Reed, he could not see where he was going, or what was behind him. At this point, Mr. Reed was carrying the maul "down to his side carrying it in his right hand."

Deputy Hoy then, two more times, told Mr. Reed to "Put the maul down." Mr. Reed refused to put the maul down, and refused to stop walking towards Deputy Hoy. At this point, Deputy Hoy thought Mr. Reed was going to hit him with the maul.

When Mr. Reed had closed the "gap" to approximately 6 feet, Mr. Reed "grabbed" the maul with both of his hands, and started bringing it up. At that point, Deputy Hoy assumed Mr. Reed was going to kill him, so Deputy Hoy shot Mr. Reed in the chest. As to Deputy Hoy's intent at the time of the shooting, Deputy Hoy testified at trial as follows:

> "A. Killing never occurred to me. That's not the intent. The-- The idea of shooting a person is to stop the threat.
>
> Q. Are you trained to shoot at the largest mass the object presents?
> A. That's correct. If you tried to shoot at a finger it would be a lot easier to miss. The largest mass is a lot easier to hit."

After the shooting, at the hospital, Mr. Reed admitted "that he felt that what happened should have happened." After Mr. Reed was released from the hospital, he told Robert Benedict, a neighbor and friend of twelve years, that he would have used the maul on Deputy Hoy, if Hoy had not shot him. As testified by Mr. Benedict at trial:

> "A. At that time of our conversation he said that he had spoke with, I think, another--another officer or something, but he was telling me that he did have intentions of using the splitting maul and that it was probably a good thing that it happened the way it happened.
>
> Q. So he told you that he did have intentions of using the maul and that was probably a good thing that he had gotten shot?
> A. Yes, something to that effect."

At trial, Mr. Reed never denied making the above statement to Mr. Benedict.

Prior to the incident, Deputy Hoy had received 671 hours of training in all areas of law enforcement, not including his training in the use of deadly force. He also had attended the the Police Academy, in Monmouth, Oregon. The course at the Police Academy lasted seven weeks, and was conducted five days a week, eight hours a day; and included firearms

training. The academy was "run" by State of Oregon's Board on Police Standards and Training.

Deputy Hoy received his "Basic" certification from the Board on Police Standards and Training as a corrections officer on April 1, 1977, and received his "Basic" certification from the Board as a police officer on May 1, 1979. He received his "Intermediate" certification from the Board on Police Standards and Training as a police officer on July 22, 1983. (exhibit 101 at 18)

At the time of the shooting, Deputy Hoy was a certified firearm's instructor for Douglas County, having been certified on July 21, 1981 (exhibit 101 at 4); and had read and understood the Douglas County Sheriff's Department's firearm policy, a five page written document that was received into evidence at trial as defendants' exhibit 102.

At trial, Deputy Hoy's field training manual was received into evidence as plaintiff's exhibit 1, and Douglas County's records of training provided to Deputy Hoy on the use of firearms and the use of deadly force were received into evidence as defendants' exhibit 101.

A reading of Exhibit of 101 shows as follows. Deputy Hoy read and understood Douglas County's firearm policy on November 2, 1978 (exhibit 101 at 24). He received firearms training from Douglas County on the following dates: on November 14, 15, and 16, 1978, (exhibit 101 at 10, 24); on February 12, 1979 (exhibit 101 at 10); on April 10, 1979 (exhibit 101 at 10); on May 10, 1979; on September 11, 1979 (exhibit 101 at 10, 25); on February 25, 1981 (exhibit 101 at 10); on May 14, 1981 (exhibit 101 at 10); on July 21, 1981

(exhibit 101 at 10); on September 15, 1981 (exhibit 101 at 10); on February 9, 1982 (exhibit 101 at 10); and on August 25, 1983 (exhibit 101 at 14).

In May of 1982, Deputy Hoy received 40 hours of training on special weapons and tactics from Douglas County (exhibit 101 at 19); and on March 8, 1983, Douglas County provided 7 hours of training to Deputy Hoy on the subject of "night shoot and boobytraps."

On April 12, 1983, Douglas County provided 7 hours of training to Deputy Hoy on the subject of "stress shoot."

Within a year of the shooting, on September 15th and 16th, 1983, Douglas County sent Deputy Hoy to Portland, Oregon, to receive 14 hours of training by the National Law Enforcement Institute on several subjects, including the subject of "officer-involved shootings."

Finally, in November and December of 1983, Douglas County sent Deputy Hoy to San Francisco, California, for training in terrorism and officer's survival (exhibit 101 at 2), the program having been sponsored by the National Law Enforcement Institute.

3. Procedural History.

The plaintiff filed his complaint (set forth as Appendix E) on September 27, 1985, against Deputy Hoy and Douglas County, alleging that Deputy Hoy's shooting of him denied him of his "liberty without due process of law as guaranteed by the Fifth and Fourteenth Amendments" to the United States Constitution. (App-26) Plaintiff sought general and punitive damages.

In February 1987, an amended complaint (set forth as Appendix F) was filed. The amended complaint again alleged that Deputy Hoy violated "his [plaintiff's] right not to be deprived of liberty without due process of the law as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution." (App-30)

The amended complaint also added an additional claim for relief against Douglas County, alleging that Douglas County "instituted either a custom or a policy by which they did not provide Sheriff's deputys with adequate training in the use of deadly force;" and "Douglas County failed to train Defendant Hoy in the constitutional use of deadly force." (App-32)

On March 19, 1987, the parties lodged their pretrial order (set forth as Appendix G) with the district court. In the pretrial order, the plaintiff's claim against Deputy Hoy was still expressly based solely upon the Fifth and Fourteenth Amendments:

> "I. NATURE OF THE ACTION:
>
> This is an action at law brought pursuant to 42 U.S.C. 1983 for money damages to redress the deprivation of Plaintiff's rights, privileges and immunities, as secured by the **Fifth** and **Fourteenth** Amendments of the United States Constitution, caused by Defendants use of excessive force on Plaintiff, and their battery of him. . . ." (emphasis supplied) (App-34)
>
> . . . .
>
> "CLAIM ONE
>
> . . . .
>
> (c) Defendant Hoy's actions resulted in Plaintiff being deprived of his liberty without due process in contravention of the **fifth** and **fourteenth**

> amendment of the Untied States Constitution; . . . " (emphasis supplied) (App-37)

The plaintiff's claim against Douglas County was changed from a negligent standard of care as alleged in his amended complaint, to a "grossly negligent" standard of care:

> "(b) The Douglas County Sheriff's Office and Douglas County policy or custom to not provide Sheriff's Officers with adequate training in the use of deadly force was a gross deviation from accepted law enforcement procedures and constituted grossly negligent conduct towards the public in general and this Plaintiff in particular; . . . ." (App-40)

Not once in any of the allegations of the complaint, amended complaint, or the pretrial order is there a reference or mention of the Fourth Amendment, or the language of the Fourth Amendment; nor is there any contention in any of these documents, whatsoever, that an unlawful seizure of the plaintiff took place.

The trial of the case commenced before a jury on October 6, 1987. The case was tried on the constitutional amendments requested by the plaintiff; namely, an alleged violation of the Fifth and Fourteenth Amendments. At no time did the plaintiff ever assert the Fourth Amendment as a basis for recovery; and at no time did the plaintiff ever request the trial court to try the case on the basis of the Fourth Amendment. On the contrary, the plaintiff expressly represented to the court and the petitioners that his case was based upon "substantive due process," and that a negligent standard of care was not the standard of care applicable to his case; rather the standard he was asserting at trial was "intentional, unjustified, brutal, and offensive to human dignity." (App-48-49)

In the plaintiff's trial memorandum (set forth as Appendix H) submitted to the trial court at the commencement of the trial, the plaintiff expressly informed the court of his legal theory and basis for recovery as follows:

> "3. Plaintiff's Contentions of Law:
>
> A. Defendant Hoy's use of Excessive Force.
>
> Plaintiff has alleged that he was deprived of **substantive due process** as guaranteed by the **Fourteenth** Amendment by Officer Hoy on August 18, 1984.
>
> . . . .
>
> In the case before the Court Plaintiff alleges that he has been deprived of **substantive due process**. *See Rochin v. California,* 342 U.S. 165, 72 S Ct. 205, 96 L.Ed 183 (1952). . . ." (emphasis supplied) (App-48).
>
> "The Ninth Circuit in *Meredith v. State of Arizona,* 523 F.2d 481 (9th Cir. 1975) held that conduct under color of state law that can be fairly characterized as **intentional, unjustified, brutal and offensive** to human dignity violates the victims right to substantive due process.
>
> In the instant claim Plaintiff has alleged that he was shot in the chest for a distance of between six and eight feet by deputy Officer Hoy. Such conduct was "**intentional, unjustified, brutal and offensive to human dignity**". . . . ." (App-48) (emphasis supplied)

During the trial, the defendants moved for a directed verdict as to both of the plaintiff's claims. The plaintiff filed a "Memorandum in Opposition to Directed Verdict." (set forth as Appendix I.)

In the memorandum, the plaintiff once again expressly informed the trial court and the defendants that he was

relying exclusively on the Due Process Clause of the Fourteenth Amendment as his basis for recovery against Deputy Hoy, and that his claim was based upon a violation of "substantive due process." The plaintiff **agreed** (App-60) that proof of negligence (the standard actually set forth in the Fourth Amendment) was not the standard of care that governed **his** case; rather, the standard set forth in *Rutherford v. City of Berkeley,* 780 F.2d 1444 (9th Cir. 1986) was to be used by the court in evaluating his case and evidence (i.e. that defendants conduct was intentional, unjustified, brutal and offensive to human dignity.). (App-61) The plaintiff then argued as follows:

> ". . . Evidence has been presented that Defendant acted intentionally and that the shooting was unjustified. The jury could further find based on the evidence produced that the officer's use of deadly force in a situation where it was clearly unwarranted constituted **brutal conduct and was offensive to human dignity**. . . . In short if the conduct is so unreasonable that it **'shocks the conscience', a deprivation of an individual's constitutional right must be found.** Given the evidence before the jury of Defendant Hoy's lack of knowledge if he was at the right house and the myriad of options short of shooting the Plaintiff available to him a jury could conclude that his actions **'shocked the conscience'** and **constituted more than mere negligence.**" (emphasis supplied) (App-61-62)

Because the plaintiff agreed that the standard of care controlling his case against Deputy Hoy was that of the case law governing a violation of "substantive due process," the trial court instructed the jury pursuant to that standard. In fact, the first question submitted to the jury in the special verdict

form used the identical language argued by the plaintiff as controlling; that is, the jury was asked if "the plaintiff Robert Reed" was "subjected to intentional, unjustified, unprovoked, and brutal conduct by defendant Daniel Hoy." (App-22)

As to the claim against Douglas County, at trial it was the defendants' contention that the standard of care applicable to plaintiff's claim against Douglas County for its alleged failure to train Deputy Hoy was that of deliberate indifference, the same standard that this Court adopted after the trial of the case at bar in *City of Canton v. Harris*, 109 S.Ct. 1197 (1989). The plaintiff argued that the standard was that of "gross negligence." The trial court submitted the claim to the jury on the standard of "gross negligence."

The jury found, pursuant to a special verdict, that Deputy Hoy did not violate the Fourteenth Amendment. Because no constitutional violation was found to have occurred, the jury did not reach the failure to train claim against the County.

The plaintiff then appealed the judgment entered on the jury's verdict. In his brief (set forth as Appendix J) filed with the Court of Appeals on July 12, 1988, the plaintiff argued that the trial court had erred in three ways.

First, the plaintiff argued that "Magistrate Hogan's use of the word 'defendants' in his charge to the jury was both misleading and a misstatement of the law." (App-75)

Second, the plaintiff argued that "Magistrate Hogan erred in failing to give the plaintiff's requested jury instruction pertaining to an officer's duty to retreat prior to using deadly force." (App-80)

Finally, the plaintiff argued that "Magistrate Hogan's admission into evidence of testimony regarding the plaintiff's possession of marijuana was an abuse of discretion prejudicing plaintiff's case." (App-81)

Nowhere in plaintiff's brief was there an argument or an assignment of error that the trial court erred because (1) it failed to try the case on the basis of the Fourth Amendment, or (2) it failed to instruct the jury on the standard of care and language of the Fourth Amendment, or (3) the trial court erred in failing to give plaintiff's requested jury instruction on negligence, or (4) that the trial court instructed the jury on the wrong standard of care applicable to a claim based upon "substantive due process." The plaintiff could not make such assignments of error, because his requested standard of care and the language that defined such standard of care was used by the trial court in the verdict form.

To this very day, the plaintiff has not filed one document with **any** court that mentions, even once, the words "Fourth Amendment" or the words "unreasonable seizure." Furthermore, to this very day, the plaintiff has **never** filed one document requesting **any** court to base any of his claims on the Fourth Amendment; nor has the plaintiff **ever** requested any trial or appellate court to remand his case for trial on the standard set forth in the Fourth Amendment. He tried his case on the legal theory of "substantive due process," and he has never objected or complained of that decision.

Because the issue of the applicability of the Fourth Amendment to this case was never raised by the plaintiff at trial or on appeal, the defendants have never briefed the issues

resulting in the reversal of the judgment entered in their favor; and up to this date, those issues have never been briefed by any of the parties to this litigation. The only time the petitioners have had the opportunity to object to any of the issues set forth in the opinion of the Ninth Circuit was at oral argument, when the three-judge panel inquired into the possible application of the *Graham* decision to this case.

Although the Fourth Amendment and its application to this case was not briefed or raised by any of the parties, the Ninth Circuit reversed the judgment entered in favor of the defendants, holding that the trial court should have instructed the jury on the standard of care of the Fourth Amendment, as articulated by this Court in *Graham v. Connor, supra.*, even though *Graham* was decided after the trial of the case at bar; and even though years before the jury trial of this case, this Court and the Ninth Circuit had expressly held that a claim of excessive force could be based upon the Fourth Amendment, if a plaintiff so desired.

After the Ninth Circuit's initial decision, the defendants petitioned the Ninth Circuit for a rehearing, with the suggestion that the matter be heard en banc. The Ninth Circuit denied the petition for rehearing, but did amend its opinion as to the claim against Douglas County, holding that "While the County provided evidence of significant training, Reed also submitted expert testimony that the County's program was far below national standards;" and thus, the court concluded that even as to Douglas County, the matter had to be remanded for trial.

REASONS FOR GRANTING THE WRIT.

1. The Court needs to clarify the standard for submitting a claim of inadequate training to the jury.

Just how much training does a county have to provide to its officers, before it can safely avoid a jury trial on a claim of inadequate training?

In reversing the judgment entered in favor of Douglas County, the Ninth Circuit held that the trial court was correct in denying Douglas County's motion for directed verdict, because the plaintiff has introduced sufficient evidence of "gross negligence" on the part of Douglas County in its training of Deputy Hoy.

The Ninth Circuit acknowledged the numerous hours of training on the use of a firearm provided to Deputy Hoy at the expense of Douglas County; but held that because an expert testified that Douglas County's training program was far below the national standard, a jury question existed.

The plaintiff's evidence at trial of inadequate training was the testimony of plaintiff's expert, Donald VanBlaricom, a former Police of Chief of the City of Bellevue, Washington. It is the petitioners' position that Mr. VanBlaricom never did properly testify that Douglas County's training program was inadequate; and at most, one could only argue that he implied that based upon his review of the training records of Deputy Hoy, the training of Deputy Hoy was below industry standards.

On cross-examination, Mr. VanBlaricom admitted that he had no evidence of even one complaint from a citizen against

Douglas County for the use of excessive force between 1975 and 1984; and that he had no evidence of even one complain from a citizen that a Douglas County Deputy used deadly force, during the same time period. (RT at 335). On the other hand, Mr. VanBlaricom admitted that while he was the Chief of Police for the City of Bellevue, he received an average of four or five citizens complaint per year. (RT at 335).

This Court has adopted the "deliberate indifference" standard for application to failure to train cases against municipalities. In articulating the evidence required to meet this standard, this Court stated as follows:

> "That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program. . . . It may be, for example, that an otherwise sound program has occasionally been negligently administered. Neither will it suffice to prove that an injury or accident could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct. Such a claim could be made about almost any encounter resulting in injury, yet not condemn the adequacy of the program to enable officers to respond properly to the usual and recurring situations with which they must deal. And plainly, adequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the city liable.
>
> Moreover, for liability to attach in this circumstance the identified deficiency in a city's training program must be closely related to the ultimate injury. Thus in the case at hand, respondent must still prove that the deficiency in training actually caused the police officers' indifference to her medical needs. Would the injury have been avoided had the employee been

> trained under a program that was not deficient in the identified respect? . . ." 109 S.Ct. at 1206.

The Ninth Circuit's holding in the case at bar does not comply with this Court's holdings in *City of Canton*; or *Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985); and in effect means that in every case in which a plaintiff contends that a municipality inadequately trained its officers, that case must be submitted to the jury if there is testimony from an expert, regardless of the amount of hours of training provided to the officers, and regardless of the fact that for a ten-year period prior to the incident, the municipality had no citizens' complaints against it and no prior instances of alleged excessive force. In actuality, this means that every case will go to trial and to the jury.

An example of the correct application of this Court's holding in *City of Canton* is the case of *Lewis v. City of Irvine, Ky*, 899 F.2d 451 (1990). As stated in *Lewis*,:

> "In this case, the uncontroverted evidence established that Officer Miller, who had years of experience before joining the Irvine police force, received extensive training over the course of his career. Whether that training was the best and most comprehensive available has no bearing on the plaintiffs' failure to train claim. *See id.* at ___, 109 S.Ct. at 1206. On the evidence presented in this case, reasonable jurors could only conclude that the City of Irvine's failure to train Officer Miller did not rise to the level of deliberate indifference."

The importance of this Court further defining the type of cases to be submitted to the jury in failure to train cases cannot be overstated. Lawsuits against municipalities are on the rise, and the expenses associated with defending them is tremendous. The *City of Canton* decision is new, and the

district and circuit courts will be applying the standard immediately. An early refinement of the type of evidence needed to "get" to the jury from this Court will greatly enhance judicial economy in the treatment of failure to train cases.

2. The Court needs to articulate when the retroactive application of *Graham* is proper.

This Court should make the final determination when, and under what circumstances, *Graham* should be applied retroactively, so that the various circuits applying *Graham* to cases tried before its decision reverse cases on a uniform basis. If the Ninth Circuit is correct, every case that has been tried prior to *Graham* will be reversed, if the jury was not instructed on the standard of care of the Fourth Amendment, regardless of the pleadings and issues raised at trial; and regardless of the state of the case law in the particular circuit prior to *Graham*.

It is the petitioners' position that in those circuits that recognized that excessive force cases could be based upon the Fourth Amendment prior to *Graham*, *Graham* should only be retroactively applied to those cases in which the plaintiff pled a claim for relief based upon the Fourth Amendment. This would then be consistent with the rule of law that only those legal theories advanced at trial are to be reviewed by an appellate court. Such a holding would also prevent a "sandbaging" of both trial judges and defendants that tried the case upon the legal theories asserted at trial by a plaintiff.

The rule of law that the Fourth Amendment could be the basis of an excessive force case was well established in the Ninth Circuit and this Court prior to the plaintiff filing his

amended complaint, prior to the lodging of the pretrial order, and prior to the trial of this case. *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985) (plaintiff pled a violation of the Fourth, Fifth, Sixth, Eighth, and the Fourteenth Amendment as a legal basis for recovery.) *McKenzie v. Lamb*, 738 F.2d 1005 (9th Cir 1984); *Robins v. Harum*, 773 F.2d 1004 (9th Cir. 1985) (plaintiff alleged a violation of the First, Fourth, Fifth, and Fourteenth Amendments.); *White By White v. Pierce County*, 797 F.2d 812 (9th Cir. 1986); *Soto v. City of Sacramento*, 567 F.Supp. 662 (1983).

As stated in *Soto* in the Ninth Circuit as early as 1983:

> ". . . Thus, if the application of excessive force is 'unreasonable' within the meaning of the Fourth Amendment, a constitutional violation occurs. . . . The rationale for this assertion is succinctly articulated by the Fourth Circuit in *Jenkins v. Averett*, 424 F.2d 1228, 1231-32 (4th Cir. 1970) . . . ." 567 F.Supp at 671.

As stated by the Ninth Circuit in 1985 in *Robins v. Harum* :

> "A section 1983 claim based on a violation of the Fourth Amendment **is on solid ground in this circuit.** This court has held that a section 1983 claim may be based upon the Fourth Amendment where the police use excessive force during arrest procedures." 773 F.2d at 1008. (emphasis supplied)

As stated in 1985 by this Court in Tennessee *v. Garner*, *supra*, at 105 S.Ct. 1699:

> "[t]here can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment."

Justice Blackmun in *Graham* recognized the need for an assertion of the Fourth Amendment before reversal is to be allowed:

> "[In] light of respondents' concession, however, that the pleadings in this case properly may be construed as raising a Fourth Amendment claim, see Brief for Respondents 3, I see no reason for the Court to find it necessary further to reach out to decide that pre-arrest excessive force claims are to be analyzed under the Fourth Amendment *rather than* under a substantive due process standard. . . .
>
> In this case, petitioner apparently decided that it was in his best interest to disavow the continued applicability of substantive due process analysis as an alternative basis for recovery in pre-arrest excessive force cases. . . ." 109 S.Ct. at 1873-74

In *Graham*, the plaintiff presented his case on the basis of the Fourth Amendment. In the case at bar, the plaintiff decided that it was in his best interest to base his claim for relief exclusively on the Due Process Clauses of the Fifth and Fourteenth Amendment, instead of the Fourth Amendment, or a combination of all three. It was also his decision not to assert any common law pendent state law claims, such as negligence or assault. The plaintiff expressly articulated the Amendments he was relying upon, none of which included the Fourth. The plaintiff had this right to choose his legal theories; it is not the role of courts to "force" legal theories upon plaintiffs, after trial to "help" them out.

If it is the opinion of this Court that there is no legal basis for recovery allowable under the Due Process Clause of the Fourteenth Amendment in pre-arrest excessive force cases, then this court should affirm the judgment entered in favor of

the defendants for that reason. If a plaintiff asserts a legal theory that does not allow recovery, the legal theory should be dismissed. It is not the court's function to find an available legal theory for a plaintiff, and then reverse the matter for trial on that available legal theory.

The situation is not any different than the situation where a person is injured by a defective product, and the plaintiff has available the legal theories of negligence and strict liability in tort. If the plaintiff only pleads the strict liability theory, and the appellate court decides that such a theory is no longer available to the plaintiff, the proper procedure is to dismiss the action, not reverse it, and remand it for a retrial on the theory of negligence.

In the case at bar, the plaintiff decided that it was in his best interest to present his case against Hoy on one legal theory, and has since that date, not contended otherwise; nor has he asked any court to apply the Fourth Amendment to his case. The trial court instructed the jury on the correct standard of care required by the Due Process Clause of the Fourteenth Amendment as established by the case law of the Ninth Circuit. The reason the trial court did not instruct the jury on the legal standard set by the Fourth Amendment was the same reason the court did not instruct the jury on the legal standards of common law negligence, common law battery, or common law assault; none of those alternative legal theories were pled or asserted by the plaintiff.

Defendants respectively submit that cases are not tried or reversed on appeal for claims and legal theories that might

have been pled or asserted; but rather, cases are tried and reversed on appeal for claims that are pled and asserted at trial. Under the circumstances of the case at bar, *Graham* should not be allowed to the basis for reversing Deputy Hoy's judgment.

3. This Court needs to advise the lower courts whether *Graham* completely precludes a plaintiff from recovering on a substantive due process standard in pre-arrest excessive force cases.

In the case at bar, the Ninth Circuit held that because the Fourth Amendment applied to the facts of the case, the plaintiff could not base recovery on a substantive due process standard. The Ninth Circuit relied upon the language set forth by this Court in *Graham*.

Graham was not a substantive due process case; whereas the case at bar is such a case. This Court now has the opportunity to advise the lower courts as to whether *Graham* precludes substantive due process cases in pre-arrest excessive force situations. It is the petitioners' position that there is no reason why a substantive due process standard can not be an alternative basis for recovery in pre-arrest excessive force cases, especially where a plaintiff is trying to collect punitive damages, an item of damages that would not be allowable upon mere proof of a Fourth Amendment violation; but would be allowable upon proof of a substantive due process violation.

4. Did a Fourth Amendment seizure take place in this case, and if so, was Deputy Hoy's conduct objectively reasonable as a matter of law.

In the situation where a police officer uses force to stop or arrest a person, there is little difficulty in concluding that a

Fourth Amendment seizure took place. However, when an officer is backing away from a person, and only uses force to stop the person from killing him, it is not clear that the Fourth Amendment is even applicable.

The question presented to this Court is whether a Fourth Amendment seizure takes place where a police officer uses force in self defense; and upon proof that the officer was not attempting to detain or arrest a person, but was actually backing away. It is the petitioners' position that because all citizens are entitled to defend themselves from being killed, a Fourth Amendment seizure does not take place simply because the person defending himself happens to be a police officer. Before the Fourth Amendment should be applied to a police officer that uses force, there should be a requirement that it must first be found that the officer was attempting to detain or arrest a person prior to any use of force. If the force is used in self defense after the officer attempted to detain or arrest the person, the Fourth Amendment would apply; but not otherwise.

Furthermore, it is the petitioners' position that even if a Fourth Amendment seizure took place in the case at bar, Deputy Hoy's conduct was, as a matter of law, objectively reasonable.

It is undisputed that the plaintiff was within six feet of Deputy Hoy with a splitting maul, and that he had refused to stop or put down the maul. Under such circumstances, Deputy Hoy was justified in shooting the plaintiff, just as one of us would have been justified in shooting a person advancing on us with a splitting maul.

5. Is it still the rule of law in federal court that a party that does not assert his basis for recovery at trial and on appeal will be deemed to have waived any basis not so asserted?

As already evident, nowhere in the pleadings, pretrial order, or trial memorandums submitted with the trial court did the plaintiff ever request his case to include the Fourth Amendment as a legal basis for recovery. Furthermore, the plaintiff did not raise the issue on appeal.

The Ninth Circuit completely ignored these important facts, and on its own, held that the plaintiff properly raised the issue of the Fourth Amendment, because the plaintiff submitted "Plaintiff's Requested Jury Instruction Number 8" (set forth as appendix K).

First, it is important to note that jury instruction number 8 is an incorrect statement of the law; and even if the Fourth Amendment applies to this case, the trial court would not have erred in refusing to give it. In addition to not correctly stating the proper standard of the Fourth Amendment, the instruction instructs the jury to find in favor of the plaintiff, if it found Deputy Hoy negligent. This is not accurate, since Deputy Hoy could have been found negligent; but not liable because of his defense of qualified immunity.

Second, the plaintiff cited two cases below the requested jury instruction; neither of which support the language of the instruction. In addition, no Fourth Amendment excessive force cases such as *Tennessee v. Garner, supra*; *Robins v. Harum, supra*; or *Soto v. City of Sacramento, supra*, were cited in support of the instruction.

Third, the requested jury instruction must be read in light of the other documents submitted by the plaintiff to the trial court. A trial court judge is only required to instruct the jury on the legal standards applicable to the legal theory which forms the basis of the plaintiff's lawsuit.

On October 1, 1987, five days before trial, the plaintiff submitted his requested jury instructions, one of which included jury instruction number 8. Subsequent to the submission of his jury instructions, the plaintiff submitted the two trial memorandums discussed above, in which he expressly stated that his claim was based upon "substantive due process." As already discussed, in his trial memorandums, the plaintiff even went so far as to advise the court of the correct language of the standard of his substantive due process claim, and agreed that a negligent standard of care was not applicable. In other words, prior to the jury being instructed, the plaintiff advised the trial court in writing that the standard of care applicable to his case was different from the standard of care set forth in jury instruction number 8.

It is also significant to note that in his trial memorandums, the plaintiff cites this Court's decision of *Tennessee v. Garner*, but not for the proposition that the Fourth Amendment standard of care set forth in *Garner* applied to his lawsuit, but rather, for the proposition that a shooting justified under state law can still be held to be unconstitutional. (App. at 52, 63).

Thus, this is not a case where the plaintiff was unaware of the legal authority allowing him to base his claim upon the Fourth Amendment; rather, it is a case where the plaintiff knew of legal authority allowing him to base his claim upon

the Fourth Amendment, but expressly elected to use a substantive due process standard instead. It is just the opposite situation presented to this Court in *Graham*, where the plaintiff's attorney elected to go exclusively with the Fourth Amendment, and not pursue a substantive due process claim.

In light of the fact that the plaintiff expressly told the court that his case was a substantive due process claim, jury instruction number 8 simply was not applicable.

Finally, the simple fact remains that the plaintiff has never contended that the Fourth Amendment applies to his case. Without such an assertion, the Ninth Circuit was without authority to remand the case for trial on the Fourth Amendment. As stated by the Ninth Circuit in *Eberle v. City of Anaheim*, 901 F.2d 814, 817 (9th Cir. 1990):

> "Kiser contends he was arrested and ejected from the stadium because he had been cheering for his team and otherwise exercising his first amendment right of free speech. Therefore, he argues, his seizure violated the federal Constitution. Kiser asserts there was substantial evidence before the jury on this theory of his case and there was insufficient evidence to the contrary to support the verdict in favor of the officers.
>
> The threshold problem with this argument is that Kiser did not include his first amendment claim, or any issue pertaining to it, in the initial pretrial order. Almost three years after the pretrial order was entered, and just fifteen days before trial, Kiser sought to add the theretofore omitted first amendment issue. The district court denied Kiser's motion to amend. Thus, the issue Kiser would have us consider is not set forth in the pretrial order. Accordingly, Kiser was precluded from offering evidence on this issue, or otherwise advancing this theory of recovery, during the trial.

Northwest Acceptance Corp. v. Lynnwood Equip., Inc., 841 F.2d 918, 924 (9th Cir.1988); *United States v. First Nat'l Bank*, 652 F.2d 882, 886 (9th Cir.1981). Because the issue was not before the trial court, we will not rule on it on appeal. *Ferris v. Santa Clara County*, 891 F.2d 715, 719 (9th Cir.1989).

In his reply brief, Kiser focuses his attack on the pretrial order itself. He contends the district court abused its discretion by refusing to permit him to amend the pretrial order to include the first amendment issue. Without expressing any opinion on the merits of this argument, we note it is probably the argument Kiser should make; but it comes too late. Kiser did not raise the argument in his opening brief. Indeed, in his opening brief he neither mentions the pretrial order nor the district court's denial of his motion to amend it. The first time the argument pops up is in Kiser's reply brief.

It is well established in this circuit that ' "[t]he general rule is that appellants cannot raise a new issue for the first time in their reply briefs." ' " *Northwest Acceptance Corp.*, 841 F.2d at 924 (quoting *United States v. Birtle*, 792 F.2d 846, 848 (9th Cir.1986)). We could consider the issue had appellees raised it in their brief. *Ellingson v. Burlington N., Inc.*, 653 F.2d 1327,1332 (9th Cir.1981). But appellees merely noted that Kiser had failed to raise the issue. Such an observation does not constitute raising the issue. *Id.* We could also "consider the issue [if] the appellee has not been misled and the issue has been fully explored." *Id.* (citation omitted). This, however, is not the case. The issue has not been fully explored. Accordingly, we hold that the issue has been waived. *See id*

CONCLUSION

As far as petitioners know, this will be the first case presented to this Court for a determination as to whether there can ever be a claim based upon a substantive due process standard in pre-arrest excessive force cases. The case at bar

also involves issues that will help clarify this Court's prior holdings in such areas as a municipality's liability for a failure to train its officers; whether the use of force in self defense constitutes a seizure as that term is use in the Fourth Amendment; and what type of conduct amounts to "objectively reasonable" conduct. Finally, the case at bar raises the issue of whether an appellate court can remand a case on a legal theory not raised or asserted at trial, or on appeal. For the reasons set forth above, the Court should issue a writ of certiorari to review the judgment and decision of the Ninth Circuit Court of Appeals in the case at bar.

Respectfully submitted,

Robert E. Franz Jr,
Attorney and Counsel for
Petitioners

90-625

No. 90-_____

In the Supreme Court of the United States

OCTOBER TERM, 1990

DANIEL HOY, DOUGLAS COUNTY, AND DOUGLAS COUNTY SHERIFF'S OFFICE,

Petitioners,

V.

ROBERT REED,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT E. FRANZ JR.
P.O. Box 10733
Eugene, Oregon 97440
Phone (503) 683-9512
Counsel for Petitioners

TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Robert Reed, Plaintiff-Appellant,

v.

Daniel Hoy; Douglas County; Douglas County Sheriff's Office,
Defendants-Appellees

No. 87-4324.

Argued and Submitted June 8, 1989.
Decided Dec.15, 1989.

Dwayne R. Murray, Bischoff & Strooband, P.C., Eugene, Or., for plaintiff-appellant.

Robert E. Franz, Jr., Eugene, Or, for defendants-appellees.

Appeal from the United States District Court for the District of Oregon.

Before BROWNING, WALLACE and FLETCHER, Circuit Judges.

FLETCHER, Circuit Judge:

Plaintiff Robert Reed brought an action against Deputy Daniel Hoy and Douglas County, alleging that his constitutional rights were violated by Hoy's use of excessive force. After a full trial, the jury found for the defendants. Reed appeals, alleging various errors in jury instructions and admission of evidence. We reverse and remand.

I.

FACTS AND PROCEEDINGS BELOW

On August 18, 1984, Deputy Daniel Hoy was dispatched

to the residence of plaintiff Robert Reed to investigate a reported domestic disturbance. When Hoy arrived at Reed's house, Reed was crouched outside the house, with his back to Hoy. Hoy' greeted Reed, and informed Reed that he was investigating a possible crime. Hoy asked if he could speak to Mrs. Reed. Reed angrily replied that his wife did not want to speak to Hoy and told Hoy "to get the hell off [his] property." Hoy then stated that he was investigating a possible family disturbance and indicated that he would leave as soon as he spoke to Mrs. Reed.

After a further brief, verbal exchange, Reed picked up a 36-inch bamboo stick used to stake flowers, and again demanded that Hoy leave the premises. In response, Hoy drew his nightstick. Hoy again requested to see Mrs. Reed. Reed walked to the porch, put down the bamboo stick, and picked up a splitting maul. He advanced toward Hoy, again demanding that Hoy leave his property. Reed testified that he was very angry and that his purpose was to scare Hoy. Hoy retreated, walking backwards. He told Reed to put down the maul, but Reed refused.

Hoy continued walking backwards, and Reed continued to advance, closing the distance between the two. Hoy again asked Reed to put down the maul. When Reed refused and continued to advance toward him, Hoy drew his service revolver and pointed it at Reed, again requesting that Reed put down the maul. Hoy testified that Reed continued to advance, grabbing the maul with both hands, and raising it in a threatening manner. Hoy then shot Reed in the chest. Reed filed this action under 42 U.S.C. § 1983, alleging that Hoy

used excessive force, violating Reed's constitutional rights. Reed also alleged that the County was liable for failure to train Hoy adequately in the use of force. The jury ruled in favor of the defendants. Reed appeals, alleging several errors in the conduct of the trial. We have jurisdiction under 28 U.S.C. § 1291.

II.

STANDARD OF REVIEW

We review jury instructions to determine whether, taken as a whole, they mislead the jury or state the law incorrectly to the prejudice of the objecting party. *Kisor v Johns-Manville Corp.*, 783 F.2d 1337,1340 (9th Cir.1986). So long as they do not, we review the formulation of the instructions and the choice of language for abuse of discretion. *United States v. Echeverry*, 759 F.2d 1451, 1455 (9th Cir.1985).

III.

DISCUSSION

A. The *Rinker* Instruction

Reed argues that the district court incorrectly instructed the jury on the level of culpability necessary to find that Hoy violated Reed's constitutional rights. The instruction to which Reed objects reads as follows:

> Now, in order for the Plaintiff to prevail in this matter on his due process claim against the Defendants, the Plaintiff must prove by a preponderance of the evidence that the shooting of Plaintiff by . . . Deputy Hoy was *intentional, unjustified, unprovoked, and brutal.*
>
> In other words you are to decide whether Deputy Hoy shot the Plaintiff in a good faith effort to protect himself or did so *maliciously and for the very purpose*

of injuring the Plaintiff.

Reporter's Transcript (RT) at 417 (emphasis added).[1] The instruction given by the district court was based on language in *Rinker v. County of Napa,* 820 F.2d 295, *opinion withdrawn, substituted opinion on reh'g,* 831 F.2d 829, 831-32 (9th Cir. 1987).

In *Rinker,* the plaintiff sued a police officer who had shot him in the face during a raid of his apartment. Viewing Rinker's action as one invoking substantive due process, we held that Rinker could establish a substantive due process violation only if the force applied to the defendant was applied "maliciously and sadistically for the very purpose of causing harm." 831 F.2d 831-32 (quoting *Johnson v. Glick,* 481 F.2d 1028 (2d Cir.), *cert. denied,* 414 U.S.1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973)). Unfortunately, the *Rinker* instruction

1. The district court refused to give Reed's proposed alternative instruction, Requested Jury Instruction No. 8, which reads:

A person has the right to be free from excessive force. An officer is entitled to use such force as a reasonable person would think is required to accomplish lawful objectives. However, an officer is not allowed to use any force beyond that reasonably necessary to accomplish his lawful purpose. Thus, if you find that the defendant used greater *force than was reasonably necessary in the circumstances of this case,* you must find that the defendant is liable for a violation of the plaintiff's constitutional rights. Clerk's Record (CR), Tab 27 at 13 (emphasis added).

given by the district court is inconsistent with the standards recently enunciated by the Supreme Court for evaluating the constitutionality of a law enforcement official's use of force to subdue a citizen. *See Graham v. Connor*, ___U.S._____, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).

In *Graham*, a police officer stopped plaintiff Graham because he suspected that Graham may have robbed a convenience store. However, Graham had merely hurriedly entered and left the store in an effort to obtain fruit juice in order to alleviate a diabetic condition. The officer instructed Graham to wait while he checked to see if the store had been robbed. Graham, suffering an insulin reaction, began behaving strangely, then passed out. While he was unconscious, backup officers cuffed his hands tightly behind his back. When he regained consciousness and attempted to explain his condition to the officers and direct their attention to a diabetic decal that.he carried in his wallet, one of them told him to shut up, and slammed his head against a car. Four officers then shoved him head first into a police car. When a friend of Graham's brought fruit juice to the car, they refused to let him drink it. Eventually, the officers learned that there had been no robbery and released Graham. However, during his brief encounter with the police, Graham suffered a broken foot, cuts on his wrists, a head injury, and a shoulder injury. He brought an action under 42 U.S.C. § 1983, alleging that the officers' use of force was in violation of "'rights secured to him under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.' "*Id* 109 S.Ct at 1868 (quoting Graham's complaint, ¶10).

Finding, *inter alia,* that the defendants applied the force in good faith and not "maliciously or sadistically for the very purpose of causing harm," the district court directed a verdict for the defendants; and a divided panel of the Fourth Circuit affirmed. *Graham v. City of Charlotte,* 827 F.2d 945 (4th Cir.1987). The Supreme Court reversed.

The Court first noted that a majority of the lower federal courts apply the *Johnson v. Glick* test to all excessive force claims against law enforcement officials,. *Graham,* 109 S.Ct. at 1870. The Court condemned this practice, pointing out that section 1983 analysis must begin by analyzing the specific constitutional right allegedly infringed by the challenged application of force. *Id.* The Court then concluded that the fourth amendment is the specific constitutional provision governing the right of free citizens to be free from law enforcement officials' use of excessive force in the context of an arrest or investigatory stop. *Id* at 1871 *("all* claims that law enforcement officers have used excessive force— deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach"). The Court pointed out that the *Johnson v. Glick* analysis, which turns in part on the subjective intent of the officers, is inappropriate in the fourth amendment context. *Id* at 1872. As the Court noted, "[t]he Fourth Amendment inquiry is one of 'objective reasonableness' under the circumstances, and subjective concepts like 'malice' and 'sadism' have no proper place in that inquiry." *Id.* at 1873.

If the fourth amendment analysis of *Graham* applies to this case, the *Rinker* instruction was inappropriate. In order to apply *Graham* to this case, we must determine that (l) *Graham* should be applied retroactively, and (2) Hoy's allegedly excessive use of force occurred in the context of a "seizure," triggering the protection of the fourth amendment.

1. Retroactive Application of *Graham*

Our circuit recognizes that ordinarily a decision reformulating federal civil law will be applied retroactively. *Austin v. City of Bisbee,* 855 F.2d 1429, 1432 (9th Cir.1988). In certain cases, however, retroactive application of the new case law will ,produce inequitable results; and the new rules will be applied prospectively only. In determining whether a decision should be applied prospectively, a court must consider three factors as set forth in *Chevron Oil Co. v. Huson,* 404 U.S. 97, 106-07, 92 S.Ct. 349, 355-56, 30 L.Ed.2d 296 (1971): whether the decision

> (l) establish[es] a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed;
> (2) state[s] a rule whose retrospective operation will retard more than further its operation, considering the rule's prior history and its purpose and effect;
> (3) [is] a decision whose retroactive application could produce substantial inequitable results, and for which a holding of nonretroactivity would avoid injustice or hardship.

Austin, 855 F.2d at 1432-33 (citing *Chevron,* 404 U.S. at 106-07, 92 S.Ct. at 355-56). *Graham* clearly overrules past Ninth Circuit precedent. *See, e.g., Rinker,* 831 F.2d at 831-

32. However, the Supreme Court stated in *Graham:*

> Today we make explicit what was implicit in *Garner's* analysis and hold that *all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard.
> . . .

Graham, 109 S.Ct. at 1871 *(citing Tennessee u Garner,* 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985)). Thus, the Supreme Court does not view its decision as establishing a new principle of law.

In addition, retroactive application will further, not retard, the policies embodies in *Graham. Graham's* application of an objective reasonableness standard furthers the essential purposes of the fourth amendment—guaranteeing that free citizens are "'secure in their persons . . . against *unreasonable* ... seizures' of the person." *Graham,* 109 S.Ct. at 1871 (emphasis added). Conditioning liability for the use of excessive force upon a showing that the force was intentional, unprovoked and brutal would frustrate rather than further the purposes of the fourth amendment and the *Graham* rule.

Finally, retroactive application will impose no substantial inequities. The paradigm case in which we have found "substantial inequitable results" is one in which the new rule consists of a shortened statute of limitations. *See, e.g., Gibson v. United States,* 781 F.2d 1334,1339-40 (9th Cir.1986), *cert. denied,* 479 U.S. 1054, 107 S.Ct. 928, 93 L.Ed.2d 979 (1987); *Barina v. Gulf Trading & Transp. Co.,* 726 F.2d 560, 562-64 (9th Cir.1984). In such cases, retroactive application of the new rule would violate a party's

reasonable expectations upon which the timing of its filing was based and act to bar potentially valid civil claims. Similarly, in *Austin,* 855 F.2d at 1433-34, we held that the rule of *Garcia v. San Antonio Metro. Transit Auth.,* 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985), extending the protection of the Fair Labor Standards Act (FSLA) to all state and local government employees, should not be applied retroactively. In *Austin,* as in other retroactivity cases, the key to finding "substantial inequitable results" is a party's reasonable reliance on a rule of law that was later invalidated. *Austin,* at 885 F.2d 1433 ("A retroactive application of *Garcia* would punish the City of Bisbee for structuring its employment contracts according to the 'clear past precedent' that was controlling when the contracts were entered into.").

The concerns underlying our decisions in *Gibson, Barina,* and *Austin* are not present in this case. It is extremely unlikely that the conduct of Hoy or of Douglas County was influenced in any way by concerns about whether or not any potential civil liability for law enforcement officials' use of force against citizens is evaluated under the standards set out in *Rinker.*

In many respects, the retroactivity issue in this case resembles that in *Gilchrist v. Jim Slemons Imports, Inc.,* 803 F.2d 1488, 1494-95 (9th Cir.1986). In *Gilchrist,* the defendant appealed an award of damages for "willful" conduct under the Age Discrimination in Employment Act, 29 U;S.C. §§ 621-34. The jury instructions defining "willful" were erroneous in light of the subsequent Supreme Court decision in *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111,105

S.Ct. 613, 83 L.Ed.2d 523 (1985). In *Gilchrist*, we determined that *Thurston* should apply retroactively.

In this case, as in *Gilchrist*, the jury instructions in a civil trial were revealed to be erroneous by a subsequent Supreme Court decision. In each case the Supreme Court decision was arguably a clear break from past circuit precedent. However, in each case the purpose of the Supreme Court's newly articulated legal rule is furthered by retroactive application; and in each case the parties' underlying conduct was not directly influenced by the prior law. On balance, in this case, as in *Gilchrist*, the *Chevron* factors favor retroactive application of *Graham*.[2]

2. We also note that the Second Circuit, without analysis, applied *Graham* retroactively in *Miller v. Lovett*, 879 F.2d 1066, 1070 (2d Cir.1989).

2. Applicability of Fourth Amendment Analysis

We recognize that *Graham is* "objective reasonableness" standard is applicable only when the allegedly excessive force is used in the context of a "seizure" within the meaning of the fourth amendment. *Graham,* 109 S.Ct. at 1871. We hold that the "seizure" requirement was satisfied by Hoy's shooting of Reed.[3]

The Supreme Court stated in *Garner* that "there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." 471 U.S. at 7, 105 S.Ct. at 1699; Hoy contends that *Garner is* limited to situations in which deadly force is used as a means to effectuate an arrest. We reject this argument. The Supreme Court's language in *Garner* and particularly in *Brower v County of Inyo,* ____U.S._____, 109 S.Ct. 1378,103 L.Ed.2d 628 (1989), suggests that it takes a broader view of what constitutes a seizure.

3. Therefore we need not decide whether Hoy's actions prior to the shooting were sufficiently analogous to an investigatory stop to constitute a "seizure" for fourth amendment purposes. *Cf. United States v. Mendenhall,* 446 U.S. 544, 551-55, 100 S.Ct. 1870, 1875-78, 64 L.Ed.2d 497(1980); *United States v. Brignoni-Ponce,* 422 US. 873, 878, 95 S.Ct. 2574, 2578, 45 L.Ed.2d 607 (1975).

In *Brower*, the Court stated that "[v]iolation of the Fourth Amendment requires an intentional acquisition of physical control." 109 S.Ct. at 1381. It then stated that a fourth amendment seizure occurs "when there is a governmental termination of freedom of movement *through means intentionally applied*." *Id.* Applying these standards, the Court held that the County's termination of the decedent's movement occurring as a result of his physical impact with the County's roadblock was a seizure. *Id.* at 1382-83.

Under the Supreme Court's Brower analysis, Hoy's shooting of Reed was a seizure within the meaning of the fourth amendment. The Brower analysis breaks down into a three-part test: a seizure is a (l) governmental (2) termination of freedom of movement (3) through means intentionally applied. There is no dispute that the first part is satisfied: Hoy is a government actor for purposes of the fourth amendment. Hoy's shooting of Reed satisfied the second factor as well. Clearly Reed's freedom of movement was terminated as a result of the discharge of Hoy's weapon, just as Brower's freedom of movement was terminated by the County's roadblock. Finally, the third element of the Brower test is also satisfied. It is not disputed that Hoy intended to shoot Reed when he discharged the revolver, and that the shooting was intended to stop Reed's freedom to continue to advance toward Hoy. See id. at 1382 ("We think it enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place to accomplish that result.").

In short, whether the application of deadly force is for the purpose of effectuating an arrest or other stop, or for the

purpose of self-defense, it is an acquisition of physical control by a law enforcement official that implicates the victim's fourth amendment interest to be free from unreasonable seizures. Thus, whether the use of deadly force in a particular case is constitutional depends upon whether the use of such force was reasonable under the circumstances. Graham, 109 S.Ct. at 1871.

3. Application of *Graham* Analysis to this Case

It is clear that under *Graham,* excessive force claims arising before or during arrest are to be analyzed exclusively under the fourth amendment's reasonableness standard rather than the substantive due process standard embodied in the *Rinker* instruction. *Graham,* 109 S.Ct. at 1871; *id.* at 1873-74 (Blackmun, J., concurring in part). These standards differ dramatically. In *Miller v. Lovett,* a recent excessive force case arising under section 1983, the Second Circuit reversed a jury verdict in favor of the defendants and remanded for a new trial, holding that

> [i]n light of *Graham,* therefore, it was plain error to charge the jury under the old *Johnson v. Glick* standard for evaluating excessive force claims, and we reverse "without considering whether the appropriate objections were made below."

Miller, slip op. at 1070 (quoting *Heath v. Henning,* 854 F.2d 6, 9 (2d Cir.1988)). We agree with the Second Circuit, and

hold that it was plain error for the district court to give the *Rinker* instruction.[4] We reject Hoy's argument that his actions were reasonable as a matter of law and that we should affirm on the basis that he was entitled to a directed verdict. While a jury may find that Hoy acted reasonably, Reed presented sufficient evidence that a reasonable jury could rule in his favor.

Because the jury was instructed incorrectly, we reverse and remand to the district court. On retrial, the court must instruct the jury to determine whether Hoy's seizure of Reed was reasonable through balancing "'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *See Graham,* 109 S.Ct. at 1871. The jury, evaluating the particular facts and circumstances of the case, must consider the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer or others, and whether he is actively resisting arrest or attempting to evade by flight. *Id* at 1872.

4. Moreover, we note that Reed properly objected to the *Rinker* instruction and that his Requested Jury Instruction No. 8 embodies the basic elements of the reasonableness test to be applied in evaluating claims of excessive force under the fourth amendment.

B. Duty to Retreat Instruction

Because of the likelihood of a new trial, interests of judicial economy require us to address Reed's other major challenge to the jury instructions given below. Reed contends that the district court erred in refusing to instruct the jury that, under Oregon law,[5] Officer Hoy had a duty to retreat before using deadly physical force. We conclude that this contention has no merit.

5. State law is often relevant in analyzing the reasonableness of police activities under the fourth amendment. *Garner*, 471 U.S. at 15-16, 105 S.Ct. at 1703-04. In fact, the Eighth Circuit has stated that "a search unauthorized by state law would *ipso facto* violate the Fourth Amendment." *Bissonette v. Haig*. 800 F.2d 812, 816 (8th Cir.1986) (en banc). Thus, if Oregon law required Hoy to retreat before using deadly force, that is an important factor in determining whether Hoy's actions were reasonable under the fourth amendment. We note that Reed does not argue that the fourth amendment, apart from Oregon law, requires a police officer to retreat before using deadly force.

Reed relies primarily upon Or.Rev.Stat. § 161.219 [6] and *State v. Charles*, 293 Or. 273, 647 P.2d 897, 903 (1982). *Charles* involved a street fight in which the defendant killed an assailant. In his murder trial, he requested that the trial court instruct the jury that a "person claiming the right of self-defense is not required to retreat or to consider whether he could safely retreat." 647 P.2d at 898. The trial court refused to give the requested instruction, Charles was convicted, and he appealed.

The Oregon Supreme Court held that a trial court did not err in refusing to give the instruction requested by Charles. It ruled that the concept of "necessity" embodied in Oregon's

6. That section provides:

Notwithstanding the provisions of ORS 161.209, a person is not justified in using deadly physical force upon another person unless that person is:

(1) Committing or attempting to commit a felony involving the use or threatened imminent use of physical force against a person; or

(2) Committing or attempting to commit a burglary in a dwelling; or

(3) Using or about to use unlawful deadly physical force against a person.

law of self-defense embraced the concept of retreat, at least in certain situations.[7] Therefore, it concluded that there was no general "no retreat" rule in Oregon and that a "no retreat" instruction was not required under the facts of that case. *Id* at 901-03.

However, it is important to note that section 161.219 and *Charles* involve situations in which the user of deadly force was an ordinary citizen. Reed has not cited to this court a single case from any jurisdiction suggesting that police officers have the same duty to retreat as ordinary citizens. In our view, such a duty may be inconsistent with police officers' duty to the public to pursue investigations of criminal activity. We are. reluctant to apply such a rule in the absence of some clear authority.

7. The Charles court did recognize that an individual is not required to retreat when he is in his "castle" and that this "castle" concept may extend to a person's place of business or employment. *Id.* at 902.

Moreover, although neither the Oregon legislature nor the Oregon courts have dealt directly with the issue of a police officer's duty to retreat in a deadly force situation, we note that there is some indication that the duty to retreat in Oregon, whatever its precise boundaries, would not extend to police officers acting in the line of duty. The *Charles* court noted that the Oregon legislature had before it in 1970 a provision expressly requiring retreat; It provided:

> Notwithstanding the provisions of [161.209], a person is not justified in using deadly physical force upon another person unless he reasonably believes that the other person is:
>
> ...
>
> (3) Using or about to use unlawful deadly force; however a person shall not use deadly physical force in defense of himself if he knows that he can with complete safety avoid the necessity of using such force by retreating. A *person is under no duty to retreat if he* is:
>
> (a) In his dwelling and is not the original aggressor; or
>
> *(b) A peace officer or a person assisting a peace officer at his direction,* acting under [161.249].

Charles, 647 P.2d at 899 (quoting Proposed Oregon Criminal Code § 23, at 22 (1970)) (emphasis added). The court noted that the rule was rejected but that the commentary to the proposed code stated that, under the Oregon case law, the statute was probably not necessary. *Id*

Thus, the proposed statute creating a duty to retreat expressly excluded police officers performing their duties. As the *Charles* court noted, this provision was viewed as embodying the Oregon common law in effect at that time. That common law influenced the *Charles* court's analysis. We conclude that, under Oregon law, the duty to retreat does not

extend to police officers performing their official function. The district court did not err in refusing to give Reed's "duty to retreat" instruction.

IV.
CONCLUSION

Under *Graham u Connor,* excessive force claims arising from a seizure must be analyzed under the fourth amendment's reasonableness standard. The *Graham* standard is applicable to the facts of this case. Because the jury was instructed that it could not find for Reed unless the more stringent substantive due process standard was met, we must reverse the verdict in favor of Hoy and remand for a new trial. The trial court did not err in refusing to give Reed's requested "duty to retreat" instruction.

REVERSED and REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Robert Reed,
Plaintiff-Appellant,

v.

Daniel Hoy; Douglas County; Douglas County Sheriff's Office,
Defendants-Appellees

No. 87-4324.

Order Amending Opinion

Filed July 18, 1990

Before BROWNING, WALLACE and FLETCHER, Circuit Judges.

ORDER

The opinion filed December 15, 1989, 891 F.2d 1421, is amended as follows:

A new paragraph C is added at page 1428 before the Conclusion:

C. Reed also sued Douglas County, Hoy's employer, alleging an unconstitutional failure to provide adequate training. The district court denied the County's motion for a directed verdict and allowed the failure-to-train issue to go to the jury; however, the jury did not reach it because it found Hoy not liable on the underlying claim. The County now urges that we affirm the verdict for the County on the grounds that the district court should have directed a verdict in its favor.

While the County provided evidence of significant training, Reed also submitted expert testimony that the

County's program was far below national standards. Some evidence suggested that the County itself lacked confidence in the efficacy of its program. Therefore, the district court properly found factual disputes sufficient to defeat a motion for a directed verdict under the gross negligence standard it applied.

We observe, however, that an intervening Supreme Court case has held that the mental state applicable to Section 1983 failure-to-train claims is deliberate indifference, not gross negligence. *City of Canton v. Harris,* 109 S.Ct. 1197, 1204 (1989). In any further proceedings, the district court should apply the City of Canton standard.

With this amendment, the panel as constituted in the above case has voted to deny the petition for rehearing.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ROBERT REED, Plaintiff,	)	
v.	)	Civil No. 85-6415-E
	)	VERDICT
DANIEL HOY, DOUGLAS COUNTY and DOUGLAS COUNTY SHERIFF'S OFFICE, Defendants.	)	

Filed October 8, 1987.

We, the jury, find:

1. On August 18, 1984, was the plaintiff Robert Reed subjected to intentional, unjustified, unprovoked, and brutal conduct by defendant Daniel Hoy?

ANSWER: /s/ No (yes or no)

If your answer is "no," your verdict is for the defendants and the presiding juror should sign his name to this verdict form. You should not answer any more questions.

If your answer if "yes," please proceed to question 2.

2. Were defendant Daniel Hoy's actions the result of defendant Douglas County's grossly negligent failure to adequately train its police officers in the use of deadly force?

ANSWER:_____(yes or no)

If your answer to either or both of questions 1 or 2 is "yes," please answer question number 3.

3. What monetary amount do you award to plaintiff Robert Reed as compensatory damages?

ANSWER:_____(in dollar amount)

If you answer question 3, you may answer question 4.

4. What monetary amount, if any, do you award plaintiff as punitive damages?

ANSWER:_____(in dollar amount)

DATED this /s/ 8th day of October, 1987.

/s/ Mattson
PRESIDING JUROR

APPENDIX D.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ROBERT REED, Plaintiff,	)	Civil No. 85-6415-E
vs.	)	JUDGMENT
DANIEL HOY, et al., Defendants.	)	

Filed October 9, 1987

Plaintiff shall recover from the defendants nothing and this action is dismissed.

DATED this 9th day of October, 1987.

/s/ Michael R. Hogan
United States Magistrate

APPENDIX E.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ROBERT REED, Plaintiff,	)	Civil No: 85-6415-E
vs.	)	COMPLAINT (Action at Law For Money Damages)
DANIEL HOY, DOUGLAS COUNTY,DOUGLAS COUNTY SHERIFF'S OFFICE, Defendants.	)	DEMAND FOR JURY TRIAL

Plaintiff alleges:

COUNT ONE

I.

Plaintiff is a citizen of the State of Oregon.

II.

The Defendants, Daniel Hoy, Douglas County Sheriff's Department and Douglas County are all citizens or entities of the State of Oregon and residents of this judicial district.

III.

The matter in controversy exceeds Ten Thousand Dollars ($10,000.00) exclusive of interests and costs.

IV.

This action arises under 42 USC 1343, 1983 and 1985 and this Court has jurisdiction of the action under 28 USC 1331, 1332 and 1343(3).

V.

At all times material hereto, Defendant Daniel Hoy was a Deputy Sheriff of the County of Douglas, State of Oregon and

in performing the acts hereinafter set forth, said Defendant was acting in his capacity as a Sheriff's Deputy, under color of law, statutes and customs of the County of Douglas, State of Oregon.

VI.

On or about August 18, 1984, at Plaintiff's place of residence, 3761 S.W. Joe Street, Roseburg, Douglas County, Oregon, Defendant Hoy removed his service revolver from its holster, aimed the weapon, and fired it, discharging a bullet into Plaintiff's chest, intending to kill him. Such action by Defendant Hoy constituted the use of excessive force in performing his duties as a Sheriff's Deputy.

VII.

Plaintiff has been subjected, because of the above recited acts, to deprivation by the Defendant, under color of law, and of the customs and usages of the State of Oregon, of rights and privileges secured to him by the Constitution and Laws of the United States and particularly his right not to be deprived of liberty without due process of law as guaranteed by the Fifth and Fourteenth Amendments of said Constitution.

VIII.

Plaintiff alleges that as a direct consequence and result of acts of Defendant hereinabove complained of, Plaintiff was deprived of liberty for a substantial period of time, suffered anxiety, distress and great discomfort and embarrassment; his reputation was impaired and he lost much time from his home. Plaintiff also suffered physical harm from the gunshot wound rendering him sick, sore, nervous and distressed, to his general damage in the amount of Seven Hundred Fifty

Thousand Dollars. ($750,000.00).

IX.

As further direct consequence of Defendant's actions Plaintiff has incurred reasonable medical costs in the sum of One Hundred Ten Thousand Dollars ($110,000.00). Plaintiff reserves the right to amend this complaint at the time of trial to more accurately reflect his medical costs.

X.

As a further direct consequence of Defendant's actions Plaintiff has been precluded from gainful employment because of permanent severe injury to his left lung and his heart. Plaintiff has suffered a permanent loss of earning capacity in an amount to be proved at time of trial.

XI.

Plaintiff seeks reasonable attorney's fees pursuant to 42 U.S.C. 2000A(3)(b).

XII.

Plaintiff hereby demands trial by jury.

COUNT TWO

I.

Plaintiff realleges paragraphs I, II, IV, V, VI, VII as though fully set forth herein.

II.

Defendant's actions were willful and constituted a gross disregard of the rights of the Plaintiff. Defendant's conduct is of the type that will be deterred by an award of punitive damages. Plaintiff seeks an award of Five Hundred Thousand Dollars ($500,000.00) in punitive damages from the Defendant.

WHEREFORE, Plaintiff claims damages of the Defendants in the amount of:

1. Seven Hundred Fifty Thousand Dollars ($750,000.00) in general damages;

2. Special Damages for medical expenses in the amount of One Hundred Ten Thousand Dollars ($110,000.00);

3. Punitive Damages in the amount of Five Hundred Thousand Dollars ($500,000.00);

4. Reasonable attorney's fees; and

5. His costs and disbursements incurred herein.

BISCHOFF & STROOBAND, P.C.

/s/ Jerome F. Bischoff
Jerome F. Bischoff
Of Attorneys for Plaintiff

APPENDIX F.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ROBERT REED, Plaintiff,	)	Civil No: 85-6415-E
vs.	)	AMENDED COMPLAINT
DANIEL HOY, DOUGLAS COUNTY, DOUGLAS COUNTY SHERIFF'S OFFICE, Defendants.	)	

Plaintiff alleges:

COUNT ONE

1.

Plaintiff is a citizen of the State of Oregon.

2.

The Defendants, Daniel Hoy, Douglas County Sheriff's Department and Douglas County are all citizens or entities of the State of Oregon and residents of this judicial district.

3.

The matter in controversy exceeds Ten Thousand Dollars exclusive of costs and interest.

4.

This action arises under 42 U.S.C 1983 and this Court has jurisdiction of the action under 28 U.S.C 1343(3).

5.

At all times material hereto, Defendant Daniel Hoy was a Deputy Sheriff of the County of Douglas, State of Oregon and in performing the acts hereinafter set forth, said Defendant was

acting in his capacity as a Sheriff's Deputy, under color of law, statutes and customs of the County of Douglas, State of Oregon.

6.

On or about August 18, 1984, at Plaintiff's place of residence, 3761 S.W. Joe Street, Roseburg, Douglas County, Oregon, Defendant Hoy removed his service revolver from its holster, aimed the weapon, and fired it, discharging a bullet into Plaintiff's chest intending to kill him. Such action by Defendant Hoy constituted the use of excessive force in performing his duties as a Sheriff's Deputy and resulted in Plaintiff being battered.

7.

Plaintiff has been subjected, because of the above recited acts, to deprivation by the Defendant, under color of law, and of the customs and usages of the State of Oregon and Douglas County, of rights and privileges secured by the Constitution and laws of the United States and particularly his right not to be deprived of liberty without due process of law as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution.

8.

As a direct consequence and result of acts of Defendant hereinabove complained of, Plaintiff was deprived of liberty for a substantial period of time, suffered anxiety, distress and great discomfort and embarrassment; his reputation was impaired and he lost much time from his home. Plaintiff also suffered physical harm from the gunshot wound rendering him sick, sore, nervous and distressed, to his general damage in

the amount of ($750,000.00).

9.

As further direct consequence of Defendant Hoy's actions Plaintiff has incurred reasonable medical costs in the sum of One Hundred Eight Thousand Nine Hundred and Ninety Four Dollars ($108,994.00). Plaintiff reserves the right to amend this complaint at the time of trial to more accurately reflect his medical costs.

10.

As a further direct consequence of Defendant's actions Plaintiff has been precluded from gainful employment because of permanent severe injury to his left lung and his heart. Plaintiff has suffered a permanent loss of earning capacity in an amount to be proved at the time of trial.

11.

Plaintiff seeks reasonable attorney's fees pursuant to 42 U.S.C. 1988.

12.

Plaintiff hereby waives trial by jury.

COUNT TWO

13.

Plaintiff realleges paragraphs 1, 2, 4, 5, 6, 7 as though fully set forth herein.

14.

Defendant Hoy's actions were willful and constituted a gross disregard of the rights of the Plaintiff. Defendant's conduct is of the type that will be deterred by an award of punitive damages. Plaintiff seeks an award of five hundred thousand dollars ($500,000.00) in punitive damages from

Defendant Hoy.

COUNT THREE

15.

Plaintiff realleges paragraphs 1, 2, 3, as though fully set forth herein.

16.

Douglas County Sheriff's Office and Douglas County acting under the color of law instituted either a custom or a policy by which they did not provide Sheriff's deputys with adequate training in the use of deadly force.

17.

Douglas County Sheriff's Office and Douglas County failed to train Defendant Hoy in the constitutional use of deadly force.

18.

Defendant's Douglas County and Douglas County Sheriff's Office failure to provided adequate training in the use of deadly force to Sheriff's deputies caused Plaintiff to be subjected to excessive force at the hands of Defendant Hoy, thereby depriving him of constitutionally protected rights.

19.

Plaintiff realleges paragraphs 8, 9, 10, 11, 12 as if fully set forth herein.

WHEREFORE, Plaintiff prays for judgment of Defendants as follows:

1. $750,000.00) in general damages;

2. Special Damages for medical expenses in the sum of 108,994.00;

3. Special damages for lost wages and loss of earning capacity in án amount to be determined at the time of trial;

4. Punitive Damages against Defendant Hoy in the sum of $500,000.00;

5. Reasonable attorney's fees; and

6. His costs and disbursements incurred herein.

Dated this___day of February, 1987.

BISCHOFF & STROOBAND, P.C.

/s/ Jerome F. Bischoff
Jerome F. Bischoff, OSB #74036
Of Attorneys for Plaintiff

APPENDIX G.

JEROME F. BISCHOFF, OSB #74036
BISCHOFF & STROOBAND, P.C.
223 West 12th Avenue
Eugene, Oregon 97401
(503) 484-0097
Of Attorneys for Plaintiff

ROBERT E. FRANZ, JR., OSB #73091
Attorney at Law
P.O. Box 10733
Eugene, Oregon 97440
(503) 683-9512
Of Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ROBERT REED, Plaintiff, vs. DANIEL HOY, DOUGLAS COUNTY, DOUGLAS COUNTY SHERIFF'S OFFICE, Defendants.	)	Civil No: 85-6415-E PRETRIAL ORDER

The following Proposed Pretrial Order is filed with the court pursuant to Local Rule 235-2.

1. NATURE OF THE ACTION:

This is an action at law brought pursuant to 42 U.S.C. 1983 for money damages to redress the deprivation of Plaintiff's rights, privileges and immunities, as secured by the Fifth and Fourteenth Amendments of the United States Constitution, caused by Defendants use of excessive force on Plaintiff, and their battery of him. Defendants have asserted that Plaintiff has failed to state a claim against each Defendant,

that state law provides Defendant with a remedy and that Defendant Hoy acted in good faith and in self defense. A demand for jury trial was made and the Defendant requests that the case be tried to a jury in Eugene, County, Oregon. Plaintiff waives the right to trial by jury.

2. SUBJECT MATTER JURISDICTION

Subject matter jurisdiction is placed in this Court by 28 U.S.C. 1343(3). That Statute provides that "the District Courts have original jurisdiction of any civil action authorized by law to be commenced by any person: (3) to redress the deprivation, under color of any State law, statue, ordinance, regulation, custom, or usage, of any right, privilege, or immunity secured by the Constitution of the United States...."

3. AGREED FACTS AS TO WHICH RELEVANCE IS NOT DISPUTED:

(a) Plaintiff is a citizen of the State of Oregon;

(b) Defendants, Daniel Hoy, Douglas County Sheriff's Department and Douglas County are all citizens or entities of the of Oregon and residents of this judicial district;

(c) At all times material herein Defendant Daniel Hoy was a Douglas County Sheriff Deputy acting within the course and scope employment, and under the color of state law;

(d) On August 18, 1984 at approximately 3:38 p.m. Defendant Hoy was dispatched by the Douglas County Sheriff's Office to Joe Street in the Green district of Roseburg, Oregon;

(e) Upon arriving at Joe Street, Defendant Hoy entered onto of the land of Plaintiff and greeted him;

(f) Plaintiff responded by asking Defendant Hoy to leave

his property;

(g) At some time before 3:46 p.m. on August 18, 1984, Defendant Hoy had called Douglas County Sheriff's Department for back up assistance;

(h) On August 18, 1984, Plaintiff picked up a splitting maul with an end of a type that Defendant and Plaintiff can not agree on a description of;

(i) Plaintiff did not physically harm Defendant Hoy;

(j) At approximately 3:46 p.m. Defendant Hoy shot Plaintiff by discharging one round of his .357 Smith & Wesson revolver into his chest;

(k) Plaintiff suffered a gun shot wound to the chest;

(l) After the incident Plaintiff was taken by ambulance to Douglas Community Hospital;

(m) Plaintiff later received medical attention at Sacred Heart Hospital in Eugene;

4. AGREED FACTS AS TO WHICH RELEVANCE IS DISPUTED:

(a) At all times material herein, Defendant Hoy had what Plaintiff contends was a trained attack dog named "Zeus" in the back of his patrol unit. Defendant contends that "Zeus" is better described as a police dog;

(b) At all times material herein, there were no physical barriers preventing Defendant Hoy from withdrawing from Plaintiff's property;

(c) Plaintiff was neither arrested for, nor charged with any crime arising out of the incident of August 18, 1984.

5. CLAIMS AND DEFENSES:

CLAIM ONE

A. The following facts, as stated above, are agreed to by the parties of will not be controverted at trial:

Agreed Facts 3(a)-(m)

B. The following facts are agreed to but their relevance is disputed by Defendant:

Agreed Facts 4(a)-(c)

C. The following factual issues are in dispute:

(a) On or about August 18, 1984 Plaintiff was deprived of his Constitutional rights, privileges or immunities by the actions of the Defendant Hoy;

(b) Defendant Hoy deprived Plaintiff of his constitutional rights by using excessive force and battering him in the course of his investigation;

(c) Defendant Hoy's actions resulted in Plaintiff being deprived of his liberty without due process in contravention of the fifth and fourteenth amendment of the United States constitution;

(d) Due to Defendant Hoy's use of excessive force in his investigation Plaintiff has suffered a chest wound requiring medical attention;

(e) As a result of the chest wound, Plaintiff incurred the approximate sum of $108,994.00 in medical charges;

(f) Plaintiff was rendered and continues to be permanently totally disabled and has suffered a total loss of earning capacity;

(g) Plaintiff was deprived of liberty for a substantial period of time, suffers from anxiety, distress and great discomfort and is left without full strength and has a permanent injury to his chest and lung;

(h) Defendant Hoy's shooting of Plaintiff was unwarranted;

(i) Plaintiff never swung the wood maul at Defendant Hoy;

(j) Plaintiff did not physically harm Defendant Hoy;

(k) At all times in which Plaintiff had the wood maul in his hand, Plaintiff and Defendant Hoy were never closer than six feet from each other;

(l) Defendant Hoy and Plaintiff were the only witnesses to the shooting;

(m) At all times material herein Defendant Hoy was acting as an agent of Douglas County Sheriff's Office and Douglas County, such that the doctrine of Respondeat Superior applies;

DEFENSES:

A. The following facts, as stated above, are agreed to by the parties or will not be controverted at trial:

Agreed Facts 3(a)-(m)

B. The following facts are agreed to but their relevance is disputed by Plaintiff:

None

C. The following factual issues are in dispute:

1. Defendants deny the contentions of fact and law made by Plaintiff in Claim One of this pretrial order;

2. First affirmative Defense-Failure to State a Claim or Relief:

(a) Claim One fails to allege sufficient facts to constitute a claim for relief against Douglas County and the Douglas County Sheriff's Office, because Douglas County and the Douglas County Sheriff's Office did not have a custom or

policy of having its officers use excessive force; on the contrary, the custom and policy of Douglas County and the Douglas Sheriff's Office is to the effect that all deputies will use only that force allowed by law;

(b) Claim One fails to state ultimate facts to constitute a claim against all defendants, because at all times material herein, defendants did not act with deliberate or callous indifference to Plaintiff's needs;

(c) Claim One fails to state ultimate facts to constitute a claim against all defendants, because Plaintiff failed to give defendants notice as required by ORS 30.275.

3. Second Affirmative Defense-Good Faith Defense:

At all times mentioned herein, Defendant Hoy acted n good faith, and with a reasonable belief in the validity of his conduct; therefore, he is immune from liability.

4. Third Affirmative Defense-Justifiable Use of Force:

The force used by Deputy Hoy upon Plaintiff was reasonable, necessary, and justified in that Deputy Hoy reasonably believed that Plaintiff was using or about to use unlawful deadly physical force against him.

5. Fourth Affirmative Defense-Adequate State Remedy:

The Oregon Tort Claims Act provides Plaintiff with a proper remedy for his claim, and said act provides Plaintiff with proper due process of law; therefore, Plaintiff has not been denied due process law, and can not maintain an action based upon 42 U.S.C. Section 1983 against Defendants.

6. Fifth Affirmative Defense-Contributory Fault:

Plaintiff, himself, was at fault in causing the injuries he received in one or more of the following particulars:

(a) In failing to maintain a proper lookout for his own safety;

(b) In failing to obey and follow orders and directions of a person known by him to be a police officer;

(c) In attempting to use deadly force upon Defendant Hoy;

(d) In threatening to use deadly force upon Defendant Hoy.

CLAIM TWO:

A. The following facts, as stated above, are agreed to by he parties or will not be controverted at the time of trial:

Agreed Facts 3 (a)-(m)

B. The following facts are agreed but their relevance is disputed by Defendant:

Agreed Facts 4 (a)-(c)

C. The following factual issues are in dispute:

(a) It was either a policy or custom of Douglas County Sheriff's Office and Douglas County to not provide Sheriff's Officers with adequate training in the use of deadly force;

(b) The Douglas County Sheriff's Office and Douglas County policy or custom to not provide Sheriff's Officers with adequate training in the use of deadly force was a gross deviation from accepted law enforcement procedures and constituted grossly negligent conduct towards the public in general and this Plaintiff in particular;

(c) Defendants' Douglas County Sheriff's Office and Douglas County failed to train Defendant Hoy in the use of deadly force;

(d) Defendants' Douglas County Sheriff's Office and Douglas County's failure to provide training in the use of

deadly force contributed to Defendant Hoy's use of excessive force on, and battering of, Plaintiff. Depriving him of his liberty without due process of law;

(e) Plaintiff restates paragraphs (a)-(n) of Claim One as if fully set forth herein.

DEFENSES:

A. The following facts, as stated above, are agreed to by parties or will not be controverted at the time of trial:

Agreed Facts 3 (a) - (m)

B. The following facts are agreed to but their relevance is disputed by the Plaintiff:

None

C. The following factual issues are in dispute:

1. Defendants deny that the contentions of fact and law made by Plaintiff in claim two of this pretrial order;

2. First Affirmative Defense-Failure to State a Claim for Relief:

(a) Claim Two fails to state ultimate facts to constitute a claim against Defendants, because at all times material herein, Defendants did not act with deliberate or callous indifference to Plaintiff's needs;

(b) Claim Two fails to state ultimate facts to constitute a claim against Defendants, because a party can not be held liable under Section 1983 for negligent acts;

(c) Claim Two fails to state ultimate facts to constitute a claim against Defendants, because Plaintiff failed to give Defendants notice as required by ORS 30.275.

3. Second Affirmative Defense - Justifiable Use of Force:

The force used by Deputy Hoy upon Plaintiff was

reasonable, necessary, and justified in that Deputy Hoy reasonably believed that Plaintiff was using or about to use unlawful deadly physical force against him.

4. Third Affirmative Defense-Adequate State Remedy:

The Oregon Tort Claims Act provides Plaintiff with a proper remedy for his claim, and said act provides Plaintiff with proper due process of law; therefore, Plaintiff has not been denied due process law and can not maintain an action based upon 42 U.S.C. Section 1983 against Defendants.

5. Fourth Affirmative Defense-Contributory Fault:

A. Plaintiff, himself, was at fault in causing the injuries he received in one or more of the following particulars:

(i) In failing to maintain a proper lookout for his own safety;

(ii) In failing to obey and follow orders and directions of a person known by him to be a police officer;

(iii) In attempting to use deadly force upon Defendant Hoy;

(iv) In threatening to use deadly force upon Defendant Hoy.

CLAIM THREE

A. The following facts, as stated above, are agreed to by he parties or will not be controverted at trial:

Agreed Facts 3(a)-(m)

B. The following facts are agreed to, but their relevance is disputed by Defendant:

Agreed Facts 4(a) - (c)

C. The following factual issues are in dispute:

(a) Defendant Hoy's actions were willful and constituted a

gross disregard of the rights of the Plaintiff. Defendant's conduct is of the type that will be deterred by an award of punitive damages.

(b) Plaintiff is entitled to an award of punitive damages from Detective Hoy.

(c) Plaintiff realleges paragraphs (a)-(n) of his first claim as if fully set forth herein.

DEFENSES:

A. The following facts, as stated above are agreed to by the parties or will not be controverted at trial:

Agreed Facts (a)-(m)

B. The following facts are agreed to, but their relevance is disputed by Plaintiff:

None

C. The following factual issues are in dispute:

1. Defendants deny the contentions of fact and law made by Plaintiff in Claim three of this pretrial order;

2. First Affirmative Defense-Failure to State Claim for Relief:

(a) Claim Three fails to allege sufficient facts to constitute a claim for relief against Douglas County and the Douglas County Sheriff's Office, because Douglas County and the Douglas County Sheriff's Office did not have a custom or policy of having its officers use excessive force; on the contrary, the custom and policy of Douglas County and the Douglas County Sheriff's Office is to the effect that all deputies will use only that force allowed by law.

(b) Claim Three fails to state ultimate facts to constitute a claim against all defendants, because at all times material

herein, Defendants did not act with deliberate or callous Indifference to Plaintiff's needs;

(c) Claim Three fails to state ultimate facts to constitute a claim against all Defendants, because Plaintiff ailed to give Defendants notice as required by ORS 30.275.

3. Second Affirmative Defense-Good Faith Defense:

At all times mentioned herein, Defendant Hoy acted in good faith, and with a reasonable belief in the validity of his conduct; therefore, he is immune from liability.

4. Third Affirmative Defense-Justifiable Use of Force:

The force used by Deputy Hoy upon Plaintiff was reasonable, necessary, and justified in that Deputy Hoy reasonably believe that Plaintiff was using or about to use unlawful deadly physical force against him.

5. Fourth Affirmative Defense-Contributory Fault:

(i) Plaintiff, himself, was at fault in causing the injuries he received in one of the following particulars;

(ii) In failing to maintain a proper lookout for his own safety:

(iii) In failing to obey and follow orders and directions of a person known by him to be a police officer;

(iv) In attempting to use deadly force upon Defendant Hoy

(v) In threatening to use deadly force upon Defendant Hoy.

6. Fifth Affirmative Defense-Adequate State Remedy:

The Oregon Tort Claims Act provides Plaintiff with a proper remedy for his claim, and said act provides Plaintiff with proper due process of law; therefore, Plaintiff has not

been denied due process of law and can not maintain an action based upon 42 U.S.C. Section 1983 against Defendants.

6. OTHER LEGAL ISSUES:

Plaintiff

Plaintiff seeks production of the materials compiled during the District Attorney's investigation of this shooting;

Plaintiff further seeks the production of Officer Hoy's training record from the Oregon State Police Academy.

Defendant

As a result of this law suit being filed against Defendants, Defendants have been required to obtain an attorney to defend them. Under the provisions of 42 U.S.C. Section 1988, Defendants are entitled to be awarded reasonable attorney fees to be set by the Court because Plaintiff's claim is without merit.

7. AMENDMENT TO PLEADINGS:

The pleadings are hereby amended to comply with this pretrial order.

DATED:_____

_____
Roger Ousey, OSB #86259
Of Attorneys for Plaintiff

DATED:_____

_____
Robert E. Franz, Jr., OSB #73091
Of Attorneys for Defendants

APPENDIX H.

JEROME F. BISCHOFF, OSB #74036
BISCHOFF & STROOBAND, P.C.
223 West 12th Avenue
Eugene, Oregon 97401
(503) 484-0097
Of Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ROBERT REED, Plaintiff, vs. DANIEL HOY, DOUGLAS COUNTY,DOUGLAS COUNTY SHERIFF'S OFFICE, Defendants.	)	Civil No: 85-6415-E TRIAL MEMORANDUM

1. Nature of the Action:

This is an action at law brought pursuant to 42 U.S.C. 1983 for money damages. Plaintiff asserts that on August 18, 1984, on the Plaintiff's own premises, Deputy Daniel Hoy of the Douglas County Sheriff's Department, shot him with a .357 Magnum revolver from a distance of six to eight feet, without justification, because Deputy Hoy had not been adequately trained by Douglas County Sheriff's Department.

Defendants contend that Plaintiff has failed to state a claim against Douglas County and Douglas County Sheriff's Department on the grounds that neither Douglas County nor Douglas County Sheriff's Department had a policy or custom of having the officers use excessive force. Defendant also

contends that Plaintiff has failed to state ultimate facts to constitute a claim against all Defendants because Defendants did not act with deliberate or callous indifference to Plaintiff's needs. Defendants further contend that Plaintiff has failed to state ultimate facts sufficient to constitute a claim against all Defendants because Plaintiff failed to give Defendants notice as requireed by ORS 30.275. Moreover, Defendant claims that Officer Hoy's actions were taken in good faith and justified. Finally, Defendant contends that Plaintiff has not been deprived of due process because an adequate state remedy exists.

2. Summary of Facts:

The uncontradicted facts are as follows:

On August 18, 1984, at approximately 3:38 p.m., Officer Daniel Hoy was dispatched to Joe Street in the Green District of Roseburg, Oregon by the Douglas County Sheriff's Office to investigate a reported domestic disturbance. At all times Officer Hoy was acting in the course and scope of his employment. Upon arriving at Joe Street Defendant Hoy entered onto the land of the Plaintiff and greeted him. Plaintiff asked Defendant if he had a warrant and then asked Defendant Hoy to leave his property. Without placing Plaintiff under arrest, Defendant Hoy called Douglas County Sheriff's Department for back up assistance. Thereafter, Plaintiff picked up a splitting maul, and began walking toward Defendant Hoy. Defendant Hoy instructed Plaintiff to put the maul down and Plaintiff continued to advance toward the Defendant while asking him to leave his land. At no time did Plaintiff swing the wood maul at Defendant Hoy. At

approximately 3:46 p.m. Defendant Hoy discharged one round of his .357 Smith and Wesson Revolver into Plaintiff's chest from a distance of between six and eight feet.

At all times Defendant Hoy had a patrol or attack dog in the back of his patrol unit. There were no barriers preventing Defendant Hoy from withdrawing from Plaintiff's property. At no time was the Plaintiff either arrested or charged with a crime stemming from the above facts.

3. Plaintiff's Contentions of Law:

A. Defendant Hoy's use of Excessive Force.

Plaintiff has alleged that he was deprived of substantive due process as guaranteed by the Fourteenth Amendment by Officer Hoy on August 18, 1984.

In order to allege a claim upon which relief may be granted under 42 U.S.C. 1983 a Plaintiff must "allege facts establishing a deprivation of rights secured by the Constitution or laws of the United States." Rutherford v. City of Berkeley, 780 F2d 1444, 1446 (9th Cir. 1986); Havas v. Thornton, 609 F2d 372, 374 (9th Cir. 1979).

In the case before the Court Plaintiff alleges that he has been deprived of substantive due process. See Rochin v. California, 342 U.S. 165, 72 S Ct. 205, 96 L.Ed 183 (1952). The Rochin Court reasoned that substantive due process is violated when the government of its officers engage in actions that "offend those canons of decency and fairness which express the notions of English speaking peoples...." 312 U.S. at 169. Though the Rochin Court did not articulate specific standards of determining what constitutes a violation of an individual's substantive due process rights, the Court did

conclude that government conduct that "shocks the conscience" or constitutes brutal force is violative of a person's Fourteenth Amendment rights. Rutherford v. City of Berkeley, supra.

The Ninth Circuit in Meredith v. State of Arizona, 523 F.2d 481 (9th Cir. 1975) held that conduct under color of state law that can be fairly characterized as intentional, unjustified, brutal and offensive to human dignity violates the victims right to substantive due process.

In the instant claim Plaintiff has alleged that he was shot in the chest from a distance of between six and eight feet by Deputy Officer Hoy. Such conduct was "intentional, unjustified, brutal and offensive to human dignity". Plaintiff's theory is that under the circumstances of this case, Deputy Hoy was not privileged to use deadly force. Accordingly, Plaintiff has stated a cause of action against Defendant Deputy Hoy.

Further, in Monroe v. Pape, 365 U.S. 167, 81 C Ct. 473, 5 L.Ed 2d 492 (1961) the Supreme court found that a 1983 claim is independently enforceable whether or not it duplicates a parallel state remedy. The Supreme Court "had made clear that the right to bring an action under 1983...does not depend upon the exhaustion of state judicial or administrative remedies." Rutherford v. City of Berkeley, 780 F2d 1444, 1447 (9th Cir. 1986); See Gilemere v. City of Atlanta, Ga., 774 F2d 1495, 1498 (llth Cir. 1985). Moreover, Defendants' contentions that Claim One must fail because at "all times material herein, Defendants did not act with deliberate or callous indifference to Plaintiff's needs" is

not supported by the law. A Plaintiff in a 1983 claim need not show that the Defendant acted with a specific intent to deprive him of a constitutional right. See Parratt v. Taylor, 451 U.S. 527 (1981); Monroe v. Pape, 365 U.S. 167 (1961). Though Defendants contention that only deliberate or callous indifference is actionable that standard is only applicable to prison inmate Eighth Amendment Actions. See Davidson v. Cannon, 106 S Ct. 668 (1986). The protections afforded under the Fourteenth Amendment are broader than those afforded a prisoner pursuant to the Eighth Amendment. Thus, though the Court has not articulated a standard of actionable conduct under the Fourteenth Amendment it surely must be less than callous or deliberate action. Id at 675-676 (Justice Blackman dissent).

Additionally, though Defendant Hoy has claimed that his actions were taken in good faith and with a reasonable belief in the validity of his conduct and thus immune from liability, recent decisions have made it clear that a good faith decision has no place in excessive force cases. See Harlow v. Fitzgerald, 457 U.S. 800 (1982); See also City of Oklahoma City v. Tuttle, 105 S Ct. 2427, 2430 n.1 (1985).

In Harlow v. Fitzgerald, supra, the Supreme Court held that a government official is entitled to immunity unless he violated "clearly established statutory or constitutional rights of which a reasonable person would have known." Id at 818.

It is clearly established law that the use of excessive or unreasonable force does violate a person's constitutional rights. See e.g. Monroe v. Pape, supra; Rutherford v. City of Berkeley, supra; Clark v. Beville, 730 F2d 739 11th Cir.

1984); King v. Blakenship, 636 F2d 70 (4th Cir. 1980). Moreover, police officers may not contend that they were unaware of the state of the law at the time of their action. Lewis v. McMasters, 663 F2d 954 (9th Cir. 1981).

In excessive force cases the jury question should be whether there was just cause for the force used, not whether an officer is cloaked with immunity because of lack of clarity as to the legal or constitutional rules which govern his conduct.

Finally, Defendant Hoy has raised the affirmative defense that his actions in shooting the Plaintiff were justified under the circumstances. In determining when an officer is justified in using excessive force, federal courts look to the law of the state. See Singer v. Wadman, 745 F2d 606, 609 (10th Cir. 1984). But see Tennessee v. Garner, 105 S Ct. 1694 (1985). In Oregon the law of the use of deadly force is governed by both statute and common law.

ORS 161.239 defines when a peace officer may use deadly physical force in making an arrest or in preventing an escape. In the instant case Plaintiff was neither being arrested nor attempting to escape. Further, Oregon courts have not provided guidance as to whether 161.239 is applicable to non-arrest or non-escape police shootings. ORS 161.209 defines when a person may use force in defending himself or others. ORS 161.219 provides limitations on the use of deadly physical force in defense of a person. Section three of that statute provides that a person is justified in using deadly physical force upon another person if the person reasonably believes that the other person is "[u]sing or about to use

unlawful deadly physical force against a person." In State v. Charles, 293 Or 273, 647 P2d 897 (1982), the Oregon Supreme Court held that the law of Oregon required a person "to avoid threatened danger where it is possible to do so without sacrificing his own safety." Id at 647 P2d 903. Accordingly Oregon law provides that defendant Hoy would only be justified in using deadly physical force if he reasonably believed that Plaintiff was using or about to use unlawful physical force and that he could not safely avoid the threatened danger.

The United States Supreme Court in Tennessee v. Garner, 105 S.Ct. 1694, 85 L.Ed 2d 1 (1985) concluded that a shooting justified under state law can still be unconstitutional. The use of deadly force whenever it is technically permitted by state law or departmental rules, even though something less would have sufficed, is unconstitutional. See Tennessee v. Garner, supra, 105 S.Ct. at 1701 (1985). The question before this Court is not whether Officer Hoy may have been entitled to use deadly force but rather the inquiry is whether, under the circumstances, it was necessary for Officer Hoy to use deadly force.

B. Municipal Liability.

Plaintiff has alleged that his Constitutional rights were violated due to Douglas County's and the Douglas County Sheriff's Office's failure to adequately train its personnel in the use of deadly force. Inadequate training has been found to constitute an actionable municipal policy. Tiacco v. City of Renseller, 783 F.2d 319 (2nd Cir. 1986); Kibbe v. City of Springfield, 777 F2d 801 (1st Cir. 1985; 1986); Rymer v.

Davis, 775 F2d 756 (6th Cir. 1985); Grandstaff v. City of Borger, 767 F2d 161 (5th Cir. 1985); Rock v. McCoy, 763 F2d 394 (10th Cir. 1985); Weilington v. Daniels, 717 F2d 932 (4th Cir. 1983); Hirst v. Getzen, 676 F2d 1252 (9th Cir. 1982); Herrera v. Valentine, 653 F2d 1220 (8th Cir. 1981); Owens v. Haas, 601 F2d 1242 (2nd Cir. 1979).

"Under this theory, the city is liable either for failing to implement a training program for its officers or for implementing a program that was grossly inadequate to prevent the type of harm suffered by the Plaintiff." Kibbe v. City of Springfield, supra, at 803.

The municipality's failure to train must constitute gross negligence and be the moving force behind the deprivation of Plaintiff's constitutional rights. Kibbe v. City of Springfield, supra, at 809. See City of Oklahoma City v. Tuttle, 105 S Ct. 2427, 2440 (1985) (Justice Brennan concurring opinion); Polk County v. Dodson, 454 U.S. 312, 102 S Ct. 445, 70 L.Ed 2d 509 (1981).

It is by now axiomatic that 1983 liability may not be imposed upon a municipality simply on the basis of respondent superior, but it must instead be premised on a finding that the injuries were inflicted pursuant to government policy or custom. Kibbe v. City of Springfield, 777 F2d 801, 803 (1st Cir. 1985). See City of Oklahoma City v. Tuttle, ___U.S.___, 105 S.Ct. 2427, 2429, 85 L.Ed. 2d 791 (1985); Monell v. Department of Social Services, 436 U.S. 657, 694, 98 S.Ct. 2018, 56 L.Ed. 611 (1978).

4. Evidentially Matters.

A. Expert Witness.

Under rule 702 of the Rules of Federal Evidence, expert testimony concerning "scientific, technical or other specialized knowledge" is admissible if it will "assist the trier of fact to understand the evidence or to determine a fact in issue." In view of the increasing professionalism of police work, there can be little doubt that expert testimony is admissible and appropriate in police misconduct cases. See City of Oklahoma City v. Tuttle, supra; Voutour v. Vitale, 761 F2d 812, 821-822 (1st Cir. 1985): Fiacco v. City of Rensselaer, N.Y. 783 F2d 319 (2nd Cir. 1986); Young v. City of Killeen, Tex., 775 F2d 1349 (5th Cir. 1985).

Defendant intends to call William Laswell as an expert witness. Initially, it should be noted that Mr. Laswell cannot deemed be an expert on police practices as he has no experience in the field. Moreover, as the question before this Court is whether or not Deputy Hoy's use of deadly force was necessary, his testimony as to "requirements of justifiable use of force" will not aide the trier of fact to understand the evidence or to determine a fact in issue. See Wierstak v. Heffernan, 789 F2d 968 (lst Cir. 1986). Plaintiff requests that the Court conduct an in camera review of Mr. Laswell's qualifications as an expert.

If this Court allows William Laswell to testify as an expert witness, Plaintiff should be allowed to review all documents that served as the basis of his testimony. Mr. Laswell was a member of shooting review board that investigated the August 18th incident. Plaintiff has repeatedly asked the Defendants for a copy of the Review Board's findings. Defendant has refused to supply the report claiming

that the document is privileged. Even assuming at the document is privileged pursuant to ORS 192.500, plaintiff should be allowed to review the document for two reasons.

Initially it should be noted that Mr. Laswell's opinion as the propriety of the shooting must in fact be based on the information he became privy to as a member of the Review Board. lORE 511 indicates that when the holder of a privilege voluntarily testifies concerning a privileged matter the privilege is waived. In the case before the Court Mr. Laswell will undoubtedly rely on information that was gathered at the time of the Review Board's inquiry. As his testimony will include privileged matters the privilege should be considered waived.

Moreover, as an expert witness is subject to cross examination concerning the facts or data upon which his opinion is based. FRE 705; See McCormick on Evidence, sections 14-15 at 35-41 (3rd Ed. 1984).

If the Court allows Mr. Laswell to testify, Plaintiff must be allowed access to the findings of the Review Board in order to meaningly fully cross examine Defendant's proposed expert.

B. Relevancy of Character Evidence

Evidence of the character of a witness in the form of opinions or reputation is limited in scope to that bearing on the veracity of the witness. FRE 608(a). The use of any other evidence, such as evidence of Plaintiff's alleged violent nature, is not admissible under FRE 608(a).

Moreover, any use of evidence of an alleged character trait of violence of Plaintiff is without relevance and should be withheld pursuant to FRE 401, which states:

> [r]elevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." (emphasis added).

A character trait of violence is not relevant in the instant case because Defendant Officer Hoy was not aware of any such alleged trait and therefore it could not possibly bear on any decision he made in shooting Plaintiff. Defendant Hoy shot Plaintiff knowing only those character traits he could have perceived during his "brief" encounter with Plaintiff. Whether or not Plaintiff has a reputation of having a violent nature is not of "consequence to the determination of the action." FRE 401.

Alternatively, assuming the evidence passes the relevancy test under FRE 401, it fails to meet the standards of FRE 404 (a), which states in part:

> "Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion...."

> "The rationale behind this rule is the notion that this evidence has slight probative value but has a tendency to be highly prejudicial or to confuse the issues." Cohn v. Papke, 655 F.2d 191 (9th Cir. 1981).

Clearly the probative value of Plaintiff's alleged propensity for violence is far outweighed by its prejudicial nature. The question of whether Plaintiff is a violent man is not at issue in this case. Defendant's absolute lack of knowledge of Plaintiff's character traits, other than those he personally perceived, take that issue of the case. If Defendant

Hoy did not know of the purported violent character trait it could not have entered the decision process that lead to the shooting.

The Advisory Committee Notes to FRE 404 shed additional light on the question of admission of circumstantial character evidence in civil cases:

> Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the badman because of their respective characters despite what the evidence in the case shows actually happened. Advisory Committee Note to FRE 404 (quoting California Law Revision Commission).

Allowing character evidence of Plaintiff's alleged violent nature would in effect lead to allowance of the drawing of an inference imputing prior violent acts to the present case. The drawing of such an inference is inadmissible. Cohn, 655 F2d at 194.

Though the Oregon Rules of Evidence allow evidence of the character of a party for violent behavior when offered in a civil assault and battery case where self defense is pleaded and there is evidence to support such a defense, the Federal Rules of Evidence do not follow this approach. Kirkpatrick, Oregon Evidence pg. 100 (1982).

Lastly and alternatively, even if the circumstantial character evidence is admissible under FRE 404, it should be excluded under FRE 403, which states,

> Although relevant, evidence may be excluded it is probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or

misleading the jury....

FRE 403 supplies additional support for the exclusion of any circumstantial character evidence concerning alleged violent tendencies of Plaintiff because its inherent prejudicial nature will substantially outweigh its probative value.

C. Admissibility of Testimony Concerning Marihuana Allegedly Seized from Plaintiff's Truck.

Defendant proposes that Charles Orr be allowed to testify concerning his alleged discovery of marijuana and marijuana seeds in Plaintiff's truck. Plaintiff objects to the admission of this testimony on the grounds that it is irrelevant. Alternatively, if the court finds some relevance to this proposed line of testimony, the testimony's prejudicial effect outweighs any probative value it may have. FRE 401, 402, 403.

Defendant Hoy has given deposition testimony stating that he did not believe the Plaintiff to be either drunk or intoxicated. See Deposition of Daniel Hoy, pg. 58. Moreover, there are not allegations or proof that Plaintiff was either drunk or intoxicated at the time of his encounter with Defendant Hoy. The introduction of evidence that Plaintiff may have had marijuana in his truck has no bearing on the outcome of this case.

Moreover, the introduction of testimony concerning Plaintiff's alleged possession of marijuana is highly prejudicial as it suggests a decision to the jury on an improper basis. See Notes of Advisory Committee Comments to FRE 403.

_____

Jerome F. Bischoff
Of Attorneys for Plaintiff

APPENDIX I.

JEROME F. BISCHOFF, OSB #74036
BISCHOFF & STROOBAND, P.C.
223 West 12th Avenue
Eugene, Oregon 97401
(503) 484-0097
Of Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ROBERT REED, Plaintiff, vs. DANIEL HOY, DOUGLAS COUNTY, DOUGLAS COUNTY SHERIFF'S OFFICE, Defendants.	)	Civil No: 85-6415-E MEMORANDUM IN OPPOSITION TO DIRECTED VERDICT

COMES NOW, the Plaintiff in response to Defendants Motion for a directed verdict as follows:

Defendant's motion for a directed verdict should be denied as the facts presented if applied to the correct legal standard present a jury question as to whether or not Plaintiff has sustained his burden of proof.

Defendants contend that they are entitled to a directed verdict because Plaintiff has failed to produce any evidence that Defendant Officer Hoy deprived Plaintiff of his constitutional right to be secure in his person. Defendant bases his contention on an erroneous perception of the requisites necessary to sustain a 1983 action. In the companion cases of Daniels v. Williams, 474 U.S. 327, 106 S Ct. 662, 88 L.Ed.2d 662 (1986) and Davidson v. Cannon,

474 U.S. 344, 106 S Ct. 668, 88 L.Ed.2d 677 (1982) the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment is not implicated by a negligent act of an official causing unintended loss or injury to life, liberty, or property. The Court specifically left unanswered whether "something" less than intentional conduct... is enough to trigger the protections of the Due Process Clause." Daniels v. Williams, supra, 106 S Ct. at 667, n.3 (1966). However, Justice Blackmun, in his dissent to the Davidson opinion, notes that reckless or deliberate indifference conduct triggers the protections of the Eighth Amendment and that the due Process Clause provides broader protection than does the Eight Amendment. Accordingly, Justice Blackman concludes, a "violation of the Due Process Clause should not require a more culpable mental state." Davidson v. Cannon, supra, 106 S Ct. at 675-676 (1986).

The Ninth Circuit in Rinker v. County of Napa, 820 F2d 295 (9th Cir. 1987) followed the Supreme Court's lead and concluded that negligent conduct on the part of an officer does not trigger the protections of the Due Process Clause. "At most, Fitt was negligent in reacting the way he did." Id. at 299.

Plaintiff has produced evidence that indicates that Defendant Hoy was more than merely negligent in this case. Expert testimony was introduced that established that Officer Hoy used his last option first. Such conduct is not merely a deviation from acceptable conduct but constitutes recklessness, an "extreme departure from ordinary care, in a situation where a high degree of danger is apparent." Prosser, The Law of

Torts, section 34, pg. 185 (4th Ed. 1971); See Restatement 2nd of Torts, section 500 comment c; Taylor v. Lawrence, 229 Or 259, 366 P2d 735 (1961).

Defendant's assertion that the conduct must rise to the level of malicious or sadistic action is not supported by the case law. In Johnson v. Glick, 481 F2d 1028 (2nd Cir.), cert denied, 414 U.S. 1033 (1973) Justice Friendly addressed the amount of intentional force prison guards may use. "The management by a few guards of large numbers of prisoners, not usually the most gentle or tractable of men and women, may require and justify the occasional use of a degree of intentional force. Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers violates a prisoner's constitutional rights." Id. at 1033. Clearly the language "and whether the force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm, though applicable to a prison setting is inappropriate in the case before this court.

In Rutherford v. City of Berkeley, 780 F2d 1444 (9th Cir. 1986) the court found that conduct that could be fairly characterized as "intentional, unjustified, brutal and offensive to human dignity" is actionable under section 1983. (Note that the words senseless and unprovoked are not mentioned in the Rutherford summary of the law). Evidence has been presented that Defendant acted intentionally and that the shooting was unjustified. The jury could further find based on the evidence produced that the officer's use of deadly force in a situtation where it was clearly unwarranted constituted brutal

conduct and was offensive to human dignity. Further, in Trujillo v. Goodman, 825 F2d 1453 (lOth Cir. 1987) the Tenth Circuit found that "[f]orce inspired by unwise excessive zeal amounting to an abuse of official descretion...may be redressed under section 1983....Such and inquiry is a factual one, depending for its resolution on the totallity of the ciracumstances presented, and is properly reserved, in most instances, for the jury." Id at 1456. In short if the conduct is so unreasonable that it "shocks the conscience", a deprivation of an individual's constitutional right must be found. Given the evidence before the jury of Defendnat Hoy's lack of knowledge if he was at the right house and the myriad of options short of shooting the Plaintiff available to him a jury could conclude that his actions "shocked the conscience" and constituted more than mere negligence.

Municipal liability may be found when an individual is deprived of a constitutional right as a result of municipal "custom or policy". City of Oklahoma City v. Tuttle, 105 5 Ct. 2427 (1985); Monell v. New York City, Dept. of Social Services, 436 U.S. 658 (1978). If this Court finds that Plaintiff has suffered an injury to his Constitutional rights, Douglas County may be held accountable if the deprivations was the result of municipal custom or policy. Id. In the case before the Court Plaintiff has introduced evidence that the County's failure to train its officers in the use of deadly force made an unjustified shooting inevitable. Moreover, Plaintiff has produced evidence that the training or lack thereof provided to Douglas County Sheriff's Officers in the use of deadly force was a shocking departure from the standard of

care employed by other police agencies. Such testimony, if given its due weight by the jury is sufficient to establish that Plaintiff's injuries were the result of a municipal policy or custom.

Moreover, the Supreme Court in Tennessee v. Garner, 105 S Ct. 1694 (1985) held that the use of deadly force even if justified pursuant to state statute can still be a constitutional violation. Given the testimony offered in Plaintiff's case this jury could conclude that it was departmental policy to use deadly force whenever it was technically permitted, even though something less might have sufficed. Accordingly, a jury could find that Defendant Officer Hoy was merely following an unconstitutional County policy when he shot Plaintiff.

Defendant Hoy testified that he believed he was justified in shooting the Plaintiff. However, as in Tennessee v. Garner, supra, if conduct less severe would have sufficed Plaintiff would have suffered from excessive force due to a municipal policy.

Moreover, even if the jury concludes that Defendant Hoy was merely negligent Douglas County should not be shielded from liability. There has been evidence presented from which a jury could conclude that Defendant Douglas County's failure to train its officers was the direct cause of Plaintiff's injuries. Mr. Van Blaricom testified that Douglas County's failure to train its personnel created an environment that was substantially certain to result in an unjustified shooting. Such conduct on the part of Douglas County "shocks the conscience" and amounts to conduct that is "intentional,

unjustified, brutal and offensive to human dignity. A Sheriff's Officer is charged with keeping peace and maintaining law and order. Douglas County's deliberate indifference to the needs of the citizen's of Douglas County and this Plaintiff in particular given the dangerous instrumentalities under the County's control and the likelihood that harm would occur should be found to constitute a constitutional deprivation. Douglas County's deliberate indifference is the type of "abuse of governmental policy" that section 1983 was enacted to prevent.

42. U.S. C. 1983 reads in part as follows:

> Every person who under color of state ordinance, regulation, custom or usage, of any State....subjects, or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured....

There is no dispute that a municipality is consider ed a person for purposes of 1983 liability. See, Monell v . City of New York, Department of Social Services, supra . Further, Plaintiff has produced evidence that Douglas County' s failure to train its ' personnel in the use of deadly force constituted a policy. If the County subject, or causes to be subjected any citizen to the deprivation of a Constitutional right they should be found liable. Websters defines subjects as "to cause to undergo". In the case before the Court an uninterrupted chain exists from the County's policy to the injury sustained by Plaintiff. The fact that Defendant Hoy may have acted negligently should not shield the County from liability for the natural results of its policy. See, Prosser, The Law of Torts,

section 44, pg . 274 (4th Ed. 1971) . "Because Congress intended that 1983 be broadly available to compensate individuals for violations of constitutional rights a municipality could be liable where a Plaintiff could show that it was the county itself that was at fault for the damage suffered. To make this showing, a Plaintiff must prove, in the broad causal language of the statute that a policy or custom of the county subjected him or caused him to be subjected to the deprivation of constitutional rights. In a case such as this in which Plaintiff meets this burden, the county's liability would be mandated by the language and legislative history and underlying purposes of section 1983. City of Oklahoma City v. Tuttle, supra, at 2439 (Justice Blackmun dissent).

Finally, defendant contends that Count Three of Plaintiff's complaint should be dismissed as the Plaintiff has produced no evidence of wanton misconduct on the part of Officer Hoy. Plaintiff contends that the step from reckless to willful or wanton is a matter of degree best left for the jury to decide. Prosser, The Law of Torts, section 34, pg. 184 (4th Ed. 1971).

_____

Jerome F. Bischoff
Of Attorneys for Plaintiff

APPENDIX J.

NO. 87-4324

UNITED STATES COURT of APPEALS
FOR THE NINTH CIRCUIT

ROBERT REED,
Plaintiff - Appellant,
v.
DANIEL HOY, DOUGLAS COUNTY and
DOUGLAS COUNTY SHERIFF'S OFFICE,
Defendants - Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF OREGON

APPELLANT'S BRIEF

DWAYNE R. MURRAY
223 West 12th Avenue
Eugene, Oregon 97401
(503) 484-0097
Attorney for Plaintiff-Appellant

ROBERT E. FRANZ, JR.
P.O. Box 10733
Eugene, Oregon 97440
(503) 683-9512
Attorney for Defendants-Appellees

INDEX

AUTHORITIES

AUTHORITIES

UNITED STATES COURT of APPEALS
FOR THE NINTH CIRCUIT

ROBERT REED,
Plaintiff - Appellant
v.
DANIEL HOY, DOUGLAS COUNTY and
DOUGLAS COUNTY SHERIFF'S OFFICE,
Defendants - Appellees

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF FOR THE PLAINTIFF-APPELLANT

STATEMENT OF THE ISSUES

1. Whether Magistrate Hogan's jury instruction as to the type of conduct necessary to sustain a Section 1983 action was misleading or incorrectly stated the law to the prejudice of the Plaintiff-Appellant.

2. Whether Magistrate Hogan's failure to read to the jury Plaintiff's proposed jury instruction regarding a duty to retreat before using deadly force resulted in the Court failing to give adequate instructions on each element of the case.

3. Whether or not the Court's admission into evidence of testimony regarding the Plaintiff's possession of marijuana constituted error prejudicial to the Plaintiff.

STATEMENT OF THE CASE

I. BASIS OF SUBJECT MATTER JURISDICTION IN THE DISTRICT COURT

Subject matter jurisdiction placed this action in the District Court by 28 U.S.C. 1343 (3). That statute provides that "the District Courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: (3) to redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage of any right, privilege, or immunity secured by the Constitution of the United States . . ."

II. BASIS OF JURISDICTION IN THE COURT OF APPEALS

Appellant Robert Reed appeals from the October 9, 1987 final judgment in the District Court allowing no recovery on Appellant's claim of a violation of federal civil rights and personal injuries under 42 U.S.C. 1983. The Circuit Court of Appeals has jurisdiction to hear this appeal pursuant to 28 U.S.C. 1291 which provides that the Circuit Court shall have jurisdiction over appeals from all final decisions of a District Court.

III. APPEAL TO THE CIRCUIT COURT OF APPEALS IS PROPER

This case is properly appealable because the judgment below was final and disposed of the issue as to whether Plaintiff-Appellant's federal civil rights were violated under 42 U.S.C. 1983.

IV. RELEVANT DATES

Final judgment was entered by the District Court on October

9, 1987. Notice of appeal was timely filed on November 4, 1987. Although the docketing statement was filed late, it was submitted and accepted by the Court on March 7, 1988. Briefs were ordered due by the Court on June 14, 1988; however, Plaintiff-Appellant's motion for a 14 day enlargement of time to file was granted due to the complexity of the issues and attorney workload.

V. SUMMARY OF FACTS

Defendant Daniel Hoy was hired as sheriff's officer by Douglas County on July 1, 1976. (Tr. Vol. I, pg. 77). Initially, Defendant Hoy worked as a corrections officer before being transferred to the patrol division in 1978. Defendant Hoy was assigned to a field training officer for approximately six weeks prior to receiving basic training at the state police academy in Monmouth. At Monmouth Defendant Hoy underwent seven weeks of classroom training. Defendant Hoy returned to Douglas County and was again assigned to a field training officer, Michael Kennaday, for a period of one month. (Tr. Vol. I, pg. 82-89). Officer Kennaday was responsible for completing Defendant Hoy's training. After one month, Defendant Hoy was certified as having completed his requisite training. Officer Kennaday was not officially trained to serve as a training officer and neither the sheriff.or any other sheriffs department official supervises the instruction provided a cadet by the field training officer. (Tr. Vol. I, pg. 37, 52). Prior to August 1984 Defendant Hoy received no specific training or instruction on the use of deadly physical force. (Tr. Vol. I, pg. 90-93). Rather, Defendant Hoy was

merely provided with a directive as to when a firearm could be used and it is hoped that the field training officer will explain the directive to new officers. (Tr. Vol. I, pg. 51-52). Moreover, Douglas County Sheriff's Office does not provide its officers with any role playing training. (Tr. Vol. I., pg. 56). Rather, Douglas County sheriff's officers receive basic police standards training, thirty to sixty days training and read the departmental directive summarizing state law on the use of deadly physical force before being certified to serve the public. (Tr. Vol. I, pg. 75).

On August 18, 1984 Officer Daniel Hoy of the Douglas County Sheriff's Office and his attack dog, "Zeus" were dispatched to the third or fourth house on the left on "Joe Street" in order to investigate a family disturbance. (Tr. Vol. I, pg. 110). Upon arriving at Joe Street, Defendant Hoy parked his car in front of Plaintiff's house, got out of his vehicle, locked his patrol unit and entered upon the property of the Plaintiff. (Tr. Vol. I, pg. 112). At this time Defendant Hoy still did not know if he was at the site of the reported disturbance. The Plaintiff was crouched near a crawl space outside his home apparently working on some plumbing. (Id). Officer Hoy said "Hello" to the Plaintiff-Appellant (hereafter Plaintiff), who responded by saying, "What are you doing on my property?" Defendant Hoy announced that he was investigating a possible crime. Plaintiff asked the Defendant if he had a search warrant or an arrest warrant and again ordered the Defendant to leave his property. Defendant Hoy

asserted that he was investigating a family disturbance and if allowed to speak with the Plaintiff's wife, he would leave. At the time Defendant Hoy was uncertain if the Plaintiff even had a wife or if any other person was on the property. Plaintiff indicated that his wife did not wish to speak to the Defendant. (Tr. Vol. I, pg. 114). Thereafter, the Plaintiff picked up a bamboo stick and Defendant Hoy removed his nightstick from his service belt. (Tr. Vol. I, pg. 117). Plaintiff asked the Defendant if he intended to hit him and the Defendant replied, "Only if I have to." (Tr. Vol. I, pg. 117). Plaintiff dropped the stick and proceeded to the porch in front of his house. At this time Defendant Hoy sensed that his investigation was being frustrated by the Plaintiff and requested backup assistance from the Douglas County Sheriff's Office. (Tr. Vol. I, pg. 122). When the Plaintiff reached his porch, he reached into a bucket and removed a splitting maul with his right hand and proceeded down the porch steps toward Defendant Hoy insisting that the Defendant leave his property. (Tr. Vol. I., pg. 123-124). Officer Hoy did not feel that he had grounds to arrest the Plaintiff and he backed away from the Plaintiff and twice asked him to put the maul down. (Tr. Vol. I, pg. 124-126, 132). Plaintiff continued to advance toward Defendant Hoy insisting that the officer leave his property. Defendant Hoy then unholstered his .357 Magnum revolver and pointed it at the Plaintiff in an attempt to diffuse the situation. (Tr. Vol. I, pg. 132). Defendant Hoy again asked the Plaintiff to put the

maul down and the Plaintiff replied by asking if Defendant Hoy was going to shoot him. The Defendant did not respond and within seconds, intentionally discharged his weapon into the Plaintiff's chest from a distance of between six and eight feet. (Tr. Vol. I, pg. 134-137). Four minutes elapsed between the time Officer Hoy reached the property and the time he discharged his service revolver.

ARGUMENT

I. THE DISTRICT COURT JUDGE ERRED IN INSTRUCTING THE JURY THAT "IN ORDER FOR THE PLAINTIFF TO PREVAIL IN THIS MATTER ON HIS DUE PROCESS CLAIM AGAINST THE DEFENDANTS, THE PLAINTIFF MUST PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT THE SHOOTING OF THE PLAINTIFF BY DEFENDANT--OR, I'M SORRY, DEPUTY HOY WAS INTENTIONAL, UNJUSTIFIED, UNPROVOKED AND BRUTAL."

A. STANDARD OF REVIEW

In determining the propriety of a given instruction an appellate court must review the instructions which were given as a whole in an effort to determine if the charge given was satisfactory. Van Cleef v. Aeroflex Corp., 657 F. 2d 1094, 1099 (9th Cir. 1981). If the jury was misled in any way or if the instruction incorrectly stated the law to the prejudice of the objecting party, the instruction constitutes error. Maddox v. City of Los Angeles, 792 F. 2d 1408, 1412 (9th Cir. 1986); See Haygood v. Younger, 769 F. 2d 1350, 1355 (9th Cir. 1985).

B. MAGISTRATE HOGAN'S USE OF THE WORD "DEFENDANTS" IN HIS CHARGE TO THE JURY WAS BOTH MISLEADING AND A MISTATEMENT OF THE LAW.

The thrust of Plaintiff's case is that the Defendant

municipality's policy of failing to provide training on the subject of the use of deadly force was the proximate cause of the Plaintiff being deprived of his liberty without due process of law. It is well established that Section 1983 liability may be imposed on a municipality if injuries were inflicted pursuant to government "policy" or "custom." City of Oklahoma City v. Tuttle, 473 U.S. 925, 105 S. Ct. 2427, 2429, 85 L. Ed. 2d 791 (1985); Kibbe v. City of Springfield, 777 F. 2d 801, 803 (1st Cir. 1985). Though the United States Supreme Court has explicitly left open the question of whether or not a failure to train could ever arise to the level of an unconstitutional policy, a number of Circuits have recognized a municipality's failure to adequately train its personnel may serve as actionable policy or custom under Section 1983. See, e.g. Fiacco v. City of Renseller, 783 F.2d 319 (2nd Cir. 1986); Kibbe v. City of Springfield, supra, at 804; Rymer v. Davis, 775 F.2d 756 (6th Cir. 1985); Grandstaff v. City of Bolger, 767 F.2d 161 (5th Cir. 1985); Rock v. McCoy, 763 F.2d 394 (10th Cir. 1985); Marchesse v. Lucas, 756 F.2d 181 (6th Cir. 1985); Wellington v. Daniels, 717 F.2d 932, 936 (4th Cir. 1983); Hirst v. Getzen, 676 F.2d 1252 (9th Cir. 1982); Herrera v. Valentine, 653 F.2d 1220, 1224 (8th Cir. 1981); Owens v. Haas, 601 F.2d 1242, 1246 (2nd Cir) cert denied, 444 U.S. 980, 100 S.Ct. 483, 62 L.Ed.2d 407 (1979).

In order to establish liability on the part of a municipality based on a failure to train, a plaintiff must establish more than the inference that may arise from a single

excessive use of force. Tuttle, supra. A plaintiff must establish that the municipality was grossly negligent in its training of police officers and that that negligence was the proximate cause of the injury. Kibbe v. City of Springfield, 777 F.2d 801, 806 (lst Cir. 1985~; Voutour v. Vitale, 761 F.2d 812, 820 (lst Cir. 1985).

At trial the Plaintiff produced evidence that indicated that the County's failure to provide adequate training in the use of deadly force was a shocking departure from the standard of care utilized throughout the country. (Tr. Vol. II, pg. 328). Moreover, there was evidence that the decision makers within the municipality doubted the effectiveness that training in the use of deadly physical force would have in dealing with real life situations. (Tr. Vol. I, pg. 68). Finally, there was evidence that the use of unjustified deadly physical force was nearly inevitable given the lack of training provided to Douglas County Sheriff's officers. (Tr. Vol. II, pg. 328).

Magistrate Hogan in instructing the jury, recognized that the County could be held liable if its failure to train was "so reckless or grossly negligent that constitutional violations were substantially certain to result . . ." However, he misled the jury and incorrectly stated the law by instructing them that in order to prevail in this matter on his due process claim against the Defendants, the Plaintiff must " . . . that the shooting of Plaintiff by Defendant . . . Deputy Hoy was intentional, unjustified, unprovoked and brutal." Magistrate Hogan further

misled the jury by providing them with a verdict form that allowed the Plaintiff to recover from Defendants only if they found that the Plaintiff was subjected to intentional, unjustified, unprovoked and brutal conduct by Defendant Hoy. (Tr. Vol. III, pg. 425).

The implication of the instruction offered to the jury is that no matter how grossly negligent or reckless a municipality's failure to train is, there can be no liability unless the officer's conduct in implementing the policy is intentional, unjustified, unprovoked or brutal. Such an implication renders Section 1983 useless.

Section 1983 is premised on providing compensation for personnel injured by the deprivation of federal rights and the prevention of abuses of power by those acting under color of state law. Robertson v. Wegmann, 436 U.S. 584, 98 S.Ct. 1991, 56 L.Ed. 2d 554 (1978). In the matter before this Court an allegation was made and proof presented that the municipality abused its power by failing to adequately prepare its officers to serve the public. Such an abuse should be of the utmost concern to this Court and the general public. The municipality's action or failure to act placed an officer on the street with an instrumentality capable of causing death and little or no training as to when it was appropriate to use deadly force. Allowing a municipality to escape liability for its ill-conceived policy solely because the agent implementing the policy did not act maliciously is nonsensical. Whether the officer acted

negligently or maliciously, this Plaintiff was deprived of his liberty and his pursuit of happiness without due process of the law as a result of the Department's reckless failure to adequately train its personnel.

II. MAGISTRATE HOGAN ERRED IN FAILING TO GIVE THE PLAINTIFF'S REQUESTED JURY INSTRUCTION PERTAINING TO AN OFFICER'S DUTY TO RETREAT PRIOR TO USING DEADLY FORCE.

A. STANDARD OF REVIEW

In reviewing a District Court judge's decision not to give a requested jury instruction, the appellate court must ascertain if the trial judge gave adequate instructions on each element of the case. Van Cleef v. Aeroflex Corp., 657 F.2d 1094, 1098-1099 (9th Cir. 1981).

B. OREGON LAW REQUIRES AN INDIVIDUAL TO RETREAT PRIOR TO JUSTIFYING THE USE OF DEADLY FORCE.

In order to prove that Defendant Hoy's actions deprived the Plaintiff of substantive due process, Plaintiff was assigned the burden of proving that the Defendant's conduct was "intentional, unjustified, unprovoked and brutal." Plaintiff requested that the jury be instructed as to the duty to retreat before using deadly physical force. Magistrate Hogan refused to give the instruction. Plaintiff contends that this constitutes reversible error as the trial judge failed to provide the jury with an accurate summary of what constitutes the justifiable use of deadly force.

In Oregon the law of the use of deadly force is governed by

both statute and common law. In Oregon, peace officers are afforded greater latitude than citizens in justifying the use of deadly physical force only when making-an arrest or preventing an escape. ORS 161.239. In the case before the Court there is no dispute that Officer Hoy never attempted to arrest the Plaintiff nor did the Plaintiff ever attempt to escape. (Tr. Vol. I, pg. 126). Accordingly, Officer Hoy's justification for the use of deadly physical force should not differ from an ordinary citizens. ORS 161.219 provides as follows:

> "Notwithstanding the provisions of ORS 161.209 a person is not justified in using deadly physical force upon another person unless the person reasonably believes that the other person is:
>
> (l) Committing or attempting to commit a felony involving the use or threatened imminent use of physical force against a person; or
>
> (2) Committing or attempting to commit a burglary in a dwelling; or
>
> (3) Using or about to use unlawful deadly physical force against a person."

The Oregon Supreme Court in State v. Charles, 293 Or 273, 647 P2d 897, 903 ~1982) found that the law of Oregon required a person to "avoid threatened danger where it is possible to do so without sacrificing his own safety. The Charles case traces the development of the law of justification within the State of Oregon and concludes that Oregon is a member of the minority of states that require an individual to retreat from a place he had no right to be prior to using deadly physical force. Therefore,

Oregon law provides that Defendant Hoy would only be justified in using deadly physical force if he reasonably believed that the Plaintiff was using or about to use unlawful physical force and that he could not safely avoid the threatened danger.

The failure of the trial judge to instruct the jury a.~ to Defendant Hoy's duty to retreat as an element of justifying his use of deadly physical force constitutes reversible error.

III. MAGISTRATE HOGAN'S ADMISSION INTO EVIDENCE OF TESTIMONY REGARDING THE PLAINTIFF'S POSSESSION OF MARIJUANA WAS AN ABUSE OF DISCRETION PREJUDICING PLAINTIFF'S CASE.

A. STANDARD OF REVIEW

Trial court rulings on the admissibility of evidence are reviewed for abuse of discretion. Maddox v. City of Los Angeles, 792 F.2d 1408, 1412 (9th Cir. 1986).

During defense counsel's cross examination of the Plaintiff the following exchange occurred:

"Q. Was there marijuana in your pickup?
MR. STROOBAND: Your honor, I'm going to object as being - --immaterial to the issue.

THE COURT: Overruled.

Q. Let me back up. You used your pickup that morning, did you not, to go visit a friend?
A. Yes.

Q. And did you keep marijuana in the pickup?
A. Yes, there was."

B. THE MAGISTRATE ABUSED HIS DISCRETION.

Plaintiff's objection was based on Federal Rule of Evidence

403. It is for the trial judge to weigh the probative value of the evidence against the prejudicial effect the evidence might have on the jury. In the instant case the probative value of the evidence was nil. No evidence was produced that could lead to an inference that the Plaintiff was intoxicated at the time of his encounter with Defendant Hoy. The prejudicial effect of the testimony can be assumed. In fact, Magistrate Hogan recognized the mistake he had made and offered to have the testimony stricken and the jury instructed to disregard the testimony. (Tr. Vol. II, pg. 282). However, by that time the bell had been rung. The admission of the evidence placed a collateral, irrelevant and prejudicial issue before the jury.

CONCLUSION

The trial judge made errors that affected the Plaintiff's case. Plaintiff asks this Court to remand the case to the trial court for a new trial.

Respectfully submitted,
BISCHOFF & STROOBAND, P.C.

_____

Dwayne R. Murray
Of Attorneys for Plaintiff-
Appellant

APPENDIX K.

PLAINTIFF'S REQUESTED JURY INSTRUCTION NUMBER 8.

Unreasonable Force

A person has the right to be free from excessive force. An officer is entitled to use such force as a reasonable person would think is required to accomplish his lawful objectives. However, an officer is not allowed to use any force beyond that reasonably necessary to accomplish his lawful purpose. Thus, if you find that the defendant used greater force than was reasonably necessary in the circumstances of this case, you must find that the defendant is liable for a violation of the plaintiff's constitutional rights.

Monroe v. Pape, 365 U.S. 167 (1961); Shillingford v. Holmes, 34 F2d 263 (5th Cir. 1981).